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JOHNS HOPKINS UNIVERSITY STUDIES  
IN  
HISTORICAL AND POLITICAL SCIENCE  
HERBERT B. ADAMS, Editor

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History is past Politics and Politics are present History.—*Freeman*

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VOLUME XIV

6601

BALTIMORE, SLAVERY,  
AND  
CONSTITUTIONAL HISTORY

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## TABLE OF CONTENTS.

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	PAGE.
I. Constitutional History of Hawaii. By Henry E. Chambers .....	7
II. City Government of Baltimore. By Thaddeus P. Thomas .....	47
III. Colonial Origins of New England Senates. By F. L. Riley .....	101
IV-V. Slavery and Servitude in North Carolina. By John S. Bassett .....	179
VI-VII. Representation in Virginia. By J. A. C. Chandler.	263
VIII. The History of Taxation in Connecticut (1636-1776). By F. R. Jones.....	345
IX-X. Slavery in New Jersey. By H. S. Cooley.....	419
XI-XII. Causes of the Maryland Revolution of 1689. By F. E. Sparks .....	477





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I

CONSTITUTIONAL HISTORY

OF

HAWAII





JOHNS HOPKINS UNIVERSITY STUDIES  
IN  
HISTORICAL AND POLITICAL SCIENCE

HERBERT B. ADAMS, Editor

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History is past Politics and Politics are present History—*Freeman*

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FOURTEENTH SERIES

I

CONSTITUTIONAL HISTORY

OF

HAWAII

BY HENRY E. CHAMBERS

*Fellow by Courtesy, Johns Hopkins University, Sometime Assistant Professor  
Tulane University, Louisiana*

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BALTIMORE  
THE JOHNS HOPKINS PRESS  
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# CONTENTS.

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	PAGE.
<b>I. INTRODUCTION.</b>	
Position and Importance of the Hawaiian Islands.....	7
Discovery.....	7
Early History.....	8
<b>II. THE ESTABLISHMENT OF GOVERNMENTAL UNITY.</b>	
Conquests of the first Kamehamehan King.....	9
Historic Origin of the House of Nobles.....	9
Peculiar Institution of the <i>Kuhina Nui</i> .....	10
Results of the first Kamehamehan Reign.....	10
<b>III. THE ARRIVAL OF THE MISSIONARIES.</b>	
Significance of Missionary Work in Hawaii.....	10
<b>IV. THE FIRST HAWAIIAN CONSTITUTION.</b>	
Origin.....	11
A Savage Seminary of Political Science.....	12
The Drafting of the First Written Constitution.....	12
Comparison and Contrast.....	13
Synopsis of the First Constitution.....	14
Foreign Recognition of the New Government.....	15
<b>V. THE ORGANIC ACTS OF 1845.</b>	
Outgrowth of Inferences and Implied Powers.....	16
Constitutional Results.....	16
The Beginning of Hawaiian Ministerial Responsibility.....	16
<b>VI. THE CONSTITUTION OF 1852.</b>	
The Commission of Revision.....	17
Synopsis of the Constitution of 1852.....	17
Constitutional Results.....	19
<b>VII. THE CONSTITUTION OF 1864.</b>	
<i>Coup d'état</i> of Kamehameha V.....	20
The King's Objection to the Existing Constitution.....	20



	PAGE.
Constitutional Convention Convened and Prorogued.....	20
King-Made Constitution Promulgated.....	20
Synopsis of the Constitution of 1864.....	21
 VIII. THE REVOLUTION OF 1887.	
Character of the Kamehamehan Kings.....	22
Partial Success of Constitutional Government over Mixed Races .....	22
Character and Policy of Kalakaua.....	23
Constitutional Efforts to Check Misgovernment.....	23
Legislative Extravagances.....	24
Venality of the King.....	24
Public Meeting of June 30, 1887.....	24
Formal Demand for Redress of Grievances.....	24
The King Accedes.....	25
A New Constitution.....	25
 IX. THE CONSTITUTION OF 1887.	
Four Objects Accomplished.....	25
Synopsis of the Constitution of 1887.....	25
Last Years of Kalakaua's Reign.....	26
Liliuokaulani becomes Queen.....	27
Misguided Policy of the Queen.....	27
Proposed Abrogation of the Existing Constitution.....	28
The Queen's Self-arrogation of Unlimited Authority. ....	28
 X. THE REVOLUTION OF 1893.	
Organization of the Committee of Public Safety.....	28
The Queen too late Desists.....	28
The Reform Mass-meeting of January 16, 1893.....	29
The Queen Compelled to Abdicate.....	29
The Election of an Advisory Council.....	29
Organization of a Provisional Government.....	29
Establishment of the Protectorate.....	29
The Annexation Commission.....	29
A Statement of Affairs Existing at the Time.....	30
Synopsis of the Queen's Unpublished Constitution.....	31
Hawaii has no Grievance against Anglo-Saxon Civilization,	33
Failure of the Commission.....	33
 XI. THE REPUBLIC OF HAWAII.	
Successful Solution of Hawaiian Governmental Problems....	33
Institution of the Republic.....	33
The Constitution of 1894.....	34
The First President of the Republic.....	38
Annexation Still a Possibility.....	38

# CONSTITUTIONAL HISTORY OF HAWAII.

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## INTRODUCTION.

The Hawaiian Islands constitute the most important of the Polynesian groups. Their position in the Pacific Ocean being a central one, they occupy a point of vantage commanding the whole west coast of America from Bering Sea to Cape Horn. They are situated almost upon the direct commercial route between San Francisco and Australia; and vessels plying between the proposed Panama and Nicaragua canals and the ports of Japan and China will find them directly in their course. The principal members of the group are eight in number, their names being Hawaii, Oahu, Maui, Kauai, Molokai, Lanai, Niihau and Kahoolawe. Although known at one time by the name bestowed upon them in honor of the Earl of Sandwich, the name of the largest island has come to be attached to the whole group.

The discovery of the Hawaiian Islands is generally attributed to the famous navigator, Captain James Cook, who in 1788, during the course of his third voyage around the globe, sighted Oahu and visited several of its neighbors, finally meeting his death at the hands of the natives upon a second visit. But historical research has of late revealed the fact that they were known at a much earlier day. While Cortez was completing the conquest of Mexico, Magellan was sailing

upon his famous voyage across the Pacific. It was not long after this that the Philippines of Asia and the Spanish countries of America were in communication with each other.<sup>1</sup> The Bulletin of the Geographical Society of Madrid, published in 1877, is authority for the statement that one, Juan Gaetano, a Spanish navigator, made known the existence of Hawaii as early as 1555.

Up to the beginning of the present century Hawaiian history is but a narrative of inter-insular discord—petty wars between savage and feudal chiefs, relieved by occasional visits of famous navigators, such as Cook, Portlock, Dixon, La Perouse, Vancouver, Boughton and others. At times whalers made Hawaiian harbors places of rendezvous in which to refit for a continuation of their quest. Sea traders soon found the Kanaka trade very profitable. In time a white element began to mingle with the native population. At first this element consisted for the most part of licentiously inclined deserters who escaped from visiting vessels and who were hospitably harbored by the natives. In time a better class of whites, adventurous spirits and *bona fide* home seekers, began to arrive. The seeds of antipathy against these last were sown at an early day, discord being fomented by the earlier comers or depraved whites, who viewed with hostility the encroachment of the higher morality and civilization which the newcomers introduced.<sup>2</sup>

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<sup>1</sup> Cortez fitted out a squadron of three vessels commanded by Alvarado de Saavedra, which sailed from Zacatula for the Moluccas October 31, 1527. Two of the vessels were wrecked, and Hawaiian tradition fixes about this time the landing of some white people upon the Kona coast of Hawaii. See Alexander's *Brief History of the Hawaiian People*, p. 99.

<sup>2</sup> "But their most serious danger was from the foreigners who had taken up their abode among the natives. As a general rule civilized man turned savage is more dangerous than the savage-born; and their presence in heathen lands is a greater obstacle to Christianity than heathenism itself." *Mission Life in Hawaii*, p. 83.



## THE ESTABLISHMENT OF GOVERNMENTAL UNITY.

The beginning of the present century found all the islands united under one king in the person of Kamehameha I. The process by which this union was brought about is an interesting though rude illustration of the important bearing facility of communication and transportation has upon political progress. When Vancouver visited the islands in 1792 Kamehameha was king of the single island of Hawaii. His savage heart yearned for a vessel of the European type. Upon Vancouver's third visit a keel was laid and a small craft constructed for the king. In ten years Kamehameha had twenty vessels ranging in size from 25 to 50 tons burden. These plied among the islands and a rude commerce developed. The enterprising chief had long been encouraging a warlike spirit among his subjects. He next introduced fire-arms. This with his formidable little navy soon gave him considerable power, which he successfully exercised in the conquest of the other islands.

Kamehameha instituted a form of personal government which indicated some organization. The lands of the conquered islands were regarded as crown lands, and the king apportioned them to his followers according to rank and upon purely feudal principles.<sup>1</sup> He exacted in return fealty, military service and a portion of the revenues of each estate granted. The king appointed a governor for each island, who in turn appointed the tax-collectors, heads of districts, and other petty officers, subject in all cases to the king's approval.

Four great chiefs had aided him in his wars—Keeaumoku, Kameeiamoku, Kamarawa, and Keoweahoula, and these he constituted his counsellors—a savage cabinet as it were. At times a general council of chiefs was called to discuss matters of State.<sup>2</sup> This council is known to have assembled in 1823,

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<sup>1</sup> See "A Brief History of Land Titles," *Hawaiian Annual* for 1891, p. 107.

<sup>2</sup> See "A Foot-note to Hawaiian History," in report of Commissioner Blount, p. 281.

when the heir apparent set out upon a visit to England, and again in 1826, to ratify a treaty made with Commodore Jones of the American Navy.

Recognizing the utter worthlessness and inability of his heir to wisely govern and hold together the realm he had consolidated, Kamehameha established by will in 1819 a very peculiar institution in the office of premier or *Kuhina Nui*, who was to exercise equal authority with the king and veto the king's acts when the good of the kingdom required such action. Kaahumanu, his favorite queen, was designated as the first *Kuhina Nui*.

It must be said that for a savage this first king of the Hawaiian Islands was a person of marked ability, wise enough to accept good counsel, and able enough to enforce good order and obedience throughout his kingdom. His laws made no discrimination between whites and natives. When he died the governmental affairs of the island were in such a state of organization as to pave the way for advancement towards Christianity and civilization.

#### THE ARRIVAL OF THE MISSIONARIES.

The first arrival of the missionaries took place in 1820. The records of missionary life in Hawaii reveal innumerable instances of fervor, heroism, and self-dedication to the cause of spreading the gospel of Christ. Their advent worked a great change. They stood as mediators between antagonistic elements, thwarting the baser instincts of such whites as were criminally inclined and fostering the nobler qualities of the more intelligent of the natives. Their work still endures. Hawaii is the bright particular star in the galaxy of missionary enterprise. With more than one-ninth of its entire population enrolled in the public schools; with its system of postal savings banks whose deposits aggregate nearly \$1,000,000, and its post-offices doing a money order business of more than a million dollars annually; with its magnificent sugar estates

whose assessed value reaches nearly thirty million dollars and whose output approximates 130,000 tons of sugar annually ; with its annual imports of \$5,550,000 and its exports of \$13,000,000 ;<sup>1</sup> with a population of 90,000 and a public debt of only \$3,000,000 ; with its merchant marine of no insignificant proportion ; its commercial, agricultural, and mercantile enterprises ; its churches, colleges, schools, cities, and villages, Hawaii is indeed civilized, and the founders of its civilization builded better than they knew.

### THE FIRST HAWAIIAN CONSTITUTION.

Four kings of the same name and dynasty followed Kamehameha I. During the long minority of Kamehameha III, the Council of Chiefs attained great importance in the administration of governmental affairs ; and in the course of time we can readily see how it developed into the House of Nobles, which afterwards constituted the upper house of the legislative branch of the Hawaiian Constitutional Government.

The events leading up to the adoption of the first constitution are of singular interest. Contact with civilization had convinced Kamehameha and his council that their form of government was not in accord with the times, and they came to the conclusion to remodel it. I must confess I am very much impressed with the wisdom manifested by them in the manner in which they set about their task. First they recognized their own ignorance, and then they decided upon taking a course of instruction in the science of enlightened government. They sent to the United States for a legal adviser and instructor ; and failing, for some cause or other, to procure one, they chose a Mr. Richards, who was connected with the American Mission. Mr. Richards was released from his reli-

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<sup>1</sup>1889. In this year Hawaiian exports reached the highest point. In 1893 the exports amounted to \$10,962,598. *Hawaiian Annual for 1895.*



gious work and entered at once upon his duties. This was in the year 1839.

The king and council resolved themselves into an appreciative audience, and Mr. Richards delivered a course of University Extension Lectures, as it were, upon politics and administration. It cannot be said that the lecturer was a specialist in his line; nor did he bring to his almost impromptu undertaking that grasp of subject exercised by more modern minds in the full light of the advance which has been made in political science. But the lecturer chose two very good sources and authorities, to which he confined himself quite closely—the Bible and the American Declaration of Independence.

More enlightened communities might profit by the example set by this savage seminary of politics holding its session on that far-off Pacific island. Suppose when it is determined by one of our American States to adopt a new Constitution that the convention, before exercising the sovereign authority entrusted to it, would send to Ann Arbor, Princeton and Cambridge, and procure the best and maturest thought of those who have mastered the problems of institutions, governmental control and functions, and administrative sciences, what tremendous results would follow. Then a Constitution would mark a positive advance and be something more than a lawyer-made copy of pre-existing models slightly modified to suit some special purpose for which the new Constitution was deemed necessary.

Upon the completion of Mr. Richards' duties the king and chiefs proceeded to discuss thoroughly the matters he had brought to their attention. The service of a native graduate of the Lahainaluna Seminary was now procured, who drew up in the native Hawaiian language a Bill of Rights and a Code of Laws. Each section was read to the king and council, by whom it was discussed and revised. The process was repeated, and after the third reading the results were published in a pamphlet of twenty-four pages, copies of which are

exceedingly rare. This pamphlet bears date of June 7, 1839. October 8, 1840, this first Constitution was promulgated.<sup>1</sup>

The origin and growth of the first Hawaiian Constitution is a singular instance of a process of Constitution making, the reverse of that by which modern Constitutions have become what they are. In most instances constitutional liberty has been a growth from below upwards, as the common people attained and held from time to time rights and privileges wrested from reigning sovereigns. In this case it was a growth downward—at least during its formative phases. There had been no formal demand for the first Hawaiian Constitution. The king was a savage arch-chief who ruled unquestioned in his own way. The Constitution was purely a concession upon his part, and the motive which actuated him in making the concession was no doubt the impulse to ape and imitate which lower races seem as a rule to possess. When contact with foreigners brought to him a dim knowledge of political forms he determined to pattern by them. In granting this first Constitution the king surrendered no part of his power. He continued the chief element in the executive, legislative, and judicial departments of the kingdom; and thus was seemingly blended the one-man power of despotism with the forms and separated functions of a constituted government.

#### FIRST WRITTEN CONSTITUTION.

The Constitution which went into effect in 1840 provided for—

- (1) An Executive Department composed of King, *Kuhina Nui*, and Subordinate Governors appointed by the Crown.
- (2) A Legislative Department composed of King, *Kuhina Nui*, House of Nobles, and House of Representatives.

---

<sup>1</sup> Hawaii's first Constitution was republished in 1894 by the Holomua Publishing Company under the title of "*Hawaii's Blue Laws of 1840.*"

(3) A Judiciary composed of King, *Kuhina Nui*, four Chief Justices appointed by the Legislature, and District Judges appointed by the Subordinate Governors, subject to the King's approval.

The King :

Commanded the army and navy, received ambassadors, and made treaties ;

Permitted or prohibited transfers of lands and estates ;

Directed the collection and disposition of the taxes ;

Was Chief Justice of the Supreme Court.

The *Kuhina Nui* :

Performed duties of Premier ;

Supervised Government property ;

Approved or vetoed acts of the King ;

Required the approval of the King for his own acts.

King and *Kuhina Nui* served as constitutional checks upon each other. In the language of the Constitution literally construed,<sup>1</sup> "The King shall not act without the knowledge of the Premier, nor the Premier without the knowledge of the King ; and the veto of the King upon the acts of the Premier or the veto of the Premier upon the acts of the King, shall arrest the business."

Governors :

Appointed by and were subordinate to the King ;

Had charge of the military matters and war material of their respective islands ;

Appointed district tax collectors and judges ;

Supervised public improvements of a local nature.

Legislatures :

Composed of House of Nobles and House of Representatives.

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<sup>1</sup> *Hawaii's Blue Laws*, p. 4.



House of Nobles,—

Membership hereditary ;

Number as first constituted, 14.

House of Representatives,—

Elected by the people ;

Number limited by law to seven ;

Sessions of the Legislature, annual ;

Two houses sat separately or conferred together ;

Approval and signature of King and Premier necessary for legislative acts to become laws.

“No new law shall be made without the approbation of a majority of the Nobles and of a majority of the House of Representatives, as well as the signature and approval of the King and Premier.”

Judiciary :

Supreme Court,—

Composed of King, Premier, and four Justices appointed by the Legislature ;

Jurisdiction, original and appellate.

District Courts,—

Judges appointed by the Island Governors ;

Local jurisdiction only.

Method of amending Constitution :

Legislature could amend the Constitution by giving a year's notice of the proposed amendment. All amendments were subject to the King's approval.

Crude and loosely drawn as was this Constitution, it was beneficent in its effect, for it gave rise to a feeling of security unfelt before, and the whole kingdom responded to an impulse in the direction of prosperity. By it a modified form of individual land tenure was established, religious toleration proclaimed, and it introduced a rudimentary kind of legal form and judicial procedure. It was not very long after this that the powers of Europe recognized the existence “in the Sand-

wich Islands of a government capable of providing for the regularity of its relations with foreign nations.”

### THE ORGANIC ACTS OF 1845.

Hawaii's first Constitution was only a beginning, and much remained to be done. The ingenuity displayed by the advocates of good government in amending without re-submitting the whole question of Constitution adoption is certainly interesting to note. The legislature which assembled May 20, 1845, was attended by a Mr. John Ricard, described as “a young lawyer of promising genius,” who delivered a so-called masterly address upon the “Inferences of the Constitution and the Implied Powers and Duties of the King.” Mr. Ricard proposed that certain alterations be made, and his suggestions were adopted. These alterations were not made by amendment, but they are described as “Organic Acts passed by the Legislature.”

These acts created—

(1) Five Executive Departments, viz: Interior, Foreign Affairs, Finance, Public Instruction, and Attorney General.

(2) A Privy Council, composed of the heads of the five departments as given, together with the Governors of the several islands and certain honorary members appointed by the King.

(3) A third of these Acts organized more thoroughly the Judiciary, so that it consisted of District, Circuit and Supreme Courts, the jurisdictions of which were defined.

In addition Mr. Ricard, by order of the Legislature, drafted two volumes of statutes, which have served ever since as the basis of Hawaii's Civil Code.

The next important constitutional event was the passing of a law June 30, 1850, raising the number of Representatives of the people in the Legislature from seven to twenty-four, and empowering the Ministers to sit in the House of Nobles

and take part in its proceedings. This paved the way for Ministerial responsibility, which was subsequently engrafted.

### THE CONSTITUTION OF 1852.

By the year 1852 constitutional ideas were pretty thoroughly disseminated. In this year it was determined to revise the existing Constitution, making it conform more to the needs of the rapidly growing kingdom. Joint resolutions were passed by the Legislature and approved by the King providing for the appointment of a Commission of three on Revision. According to the terms of these resolutions the king appointed Mr. Judd, the Nobles, John Ii, and the Representatives, and Chief Justice Lee.<sup>1</sup>

The Constitution as drawn up by this commission was practically a new one, although it embodied the main points of the Organic Acts of 1845. It contained, however, much more that was in line with a positive advance in constitutional development. It was ratified by the Legislature, approved by the king, and was promulgated June, 1852, going into effect the December following.

#### Declaration of Rights :

Consisted of twenty-one Articles.

Most significant feature, specified that the Executive, Legislative and Judicial powers were to be kept apart and no two of them were to be united in one individual or body.

#### The King :

Powers,—

The right of absolute veto;

Was Supreme Executive Magistrate of the Kingdom ;

Commanded Army and Navy ;

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<sup>1</sup> A Sketch of the Constitutional History of the Hawaiian Kingdom. *Hawaiian Annual for 1894.*



Convened the Legislature ;  
 Granted Pardons ;  
 Made Treaties ;  
 Appointed and received Ambassadors ;  
 Appointed and removed the several Heads of Departments.

Limits to Power,—

Acts had to be approved by

- (a) *Kuhina Nui* ; or
- (b) Privy Council ; or
- (c) *Kuhina Nui*, Privy Council, and Minister to whose department said act specially referred.

*Kuhina Nui* :

Retained out of deference to the wishes of the Nobles ;  
 King's Special Councillor ;  
 Acted as Vice-King ;  
 Served as Regent while Throne was vacant.

Privy Council :

Honorary Members appointed by the King ;  
 Ministers and Governors members *ex officio* ;  
 Legalized or nullified acts of the King.

Cabinet Ministers :

Appointed by the King ;  
 Sat and voted in the House of Nobles ;  
 Made written reports annually to the Legislature.

Governors :

Commissioned by King with and by advice of Privy Council ;  
 Term of office, four years ;  
 Appointed District Judges with the advice of Supreme Court Justice.

Legislature :

Met annually in April.

Nobles,—

Appointed by the King for life ;

Number not to exceed thirty ;  
Sat as Court of Impeachment.

Representatives.—

Number not less than twenty-four nor more than forty ;  
Elected annually by universal suffrage ;  
Originated all revenue bills ;

Judiciary :

Supreme Court,—

Composed of Chief Justice and two Associates ;  
Justices held office during life or good behavior.

Circuit Courts,—

Number, four ;  
Judges appointed by King with and by consent of  
Privy Council ;  
Term of office for life or during good behavior.

District Justices,—

Appointed by Island Governors, with advice of Supreme Justice ;  
Term of office, two years.

Subsequent Amendments :

1856, Legislative sessions made biennial ;  
1862, Property qualifications exacted of Representatives.  
(Annual income of \$250.)

The Constitution of 1852 was a decided advance in the direction of popular liberty, for it granted universal suffrage, differentiated the functions of government, making them coincide with the three departments into which constitutional government is usually divided ; and placed certain checks upon the hitherto unlimited power of the king. The Lower House now attained to considerable importance. From observation made at the time it was said to be “decidedly the more dignified and business-like of the two.”

Constitutional government, as we have seen, had thus far been gaining strength. But undercurrents were at work which

were to check its further development. Just as England had her Tudor period, during which kingly power was reasserted and strengthened, followed by a Stuart period, in which absolutism was wrecked upon the rocks of revolution, so we find parallel instances in the history of these islands.

### THE CONSTITUTION OF 1864.

The Constitution of 1852 remained in effect until 1864, by which year Prince Lot had ascended the throne under the title of Kamehameha V. This prince was somewhat jealous of the American influence which was making itself decidedly felt about this time, and in his observations of the practical workings of the existing Constitution had come to the conclusion, first, that the Crown had too little authority ; second, that the people were not yet prepared for universal suffrage.

Prince Lot was proclaimed king November 30, 1863. He assumed the throne without taking the customary oath to support the existing Constitution. Instead of convening the Legislature that was to meet that year, he issued a proclamation for a constitutional convention, the date of election of members being fixed as June 13. In the meanwhile he visited the several islands in company with his retinue and explained in public and private speech the changes which he desired to have made.

The convention assembled July 7. It accomplished nothing. Strife and discord were precipitated at an early stage into its proceedings. Its methods were declared by the friends of the existing Constitution to be revolutionary. It continued its deliberations, however, until the suffrage clause was reached. Here a split occurred upon the question of property qualification. The king losing patience, prorogued the convention, declared the existing Constitution abrogated, and immediately proceeded to have one of his own drawn up.

The new Constitution was promulgated August 30, 1864. Its only title to existence was by authority of the king.



Although having no conventional sanction and no endorsement by the people, it continued in force twenty-three years. That it encountered no serious opposition is due to the fact that it contained fewer changes than what the people had been led to expect.<sup>1</sup>

The most significant of the changes wrought by the Constitution of 1864 were as follows :

Bill of Rights,—

Clause guaranteeing vote by ballot stricken out.

Clause prohibiting dual governmental functions to repose in one person or body substituted by, "No Judge of a Court of Record shall ever be a member of the Legislature."

*Kuhina Nui* :

Office abolished and provision made for a regency pending the king's absence from his kingdom, or minority of heir.

Legislature :

Nobles and Representatives were to sit in one house and to be styled the Legislative Assembly ;

Number of Nobles limited to twenty ;

Property qualification of Representatives required \$500., or annual income of \$250.

Right of Franchise :

Property qualification : Voter required to own property free of all incumbrances to the extent of \$150., or Leasehold on which the rent was at least \$25. per annum, or

Annual Income of \$75.

Educational qualification : Every voter born since 1840 required to know how to read and write.

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<sup>1</sup>The Constitution of 1864 is given in full in a pamphlet published at Honolulu in 1887, entitled "*A Sketch of Recent Events.*" The matter of this pamphlet was subsequently embodied in Commissioner Blount's report.

**Judiciary :**

Removable upon two-thirds vote of the Legislative Assembly upon cause satisfactory to the king.

**Privy Council :**

Powers of, greatly diminished ;

Approval of, no longer required in appointments to office by King ;

Voted appropriations in cases of necessity during adjournment of Legislative Assembly.

**Governors :**

Provisions concerning, removed from the Constitution and fixed by Statute.

### THE REVOLUTION OF 1887.

The Kamehamehan dynasty became extinct with the death of Kamehameha V. The election of his successor devolved upon the Legislative Assembly, who chose Lunalilo. This monarch reigned but little more than a year, when he was succeeded by Kalakaua, who ascended the throne in 1874. Now was come the period when the best people of the island, foreign and native born, found it necessary to unite for determined action to resist the encroachments of the Crown that had been multiplying for a number of years.

The experiment of carrying on a constitutional government of the Anglo-Saxon type in a country with as mixed a population as these islands possessed was a difficult and doubtful one. We cannot but admire the rare ability and unselfish patriotism of the men, both whites and educated natives, who undertook the experiment and for more than thirty years made it fairly successful. It seemed for a while that these islands would give to the world a lesson in the art of combining widely different races under one form of government. The kings of the Kamehamehan line were, as a rule, sincere patriots—having some conception of their position as constitutional

sovereigns, and of the true policy to be pursued towards the foreigners.

Kalakaua, however, seemed to be blind to the course events were taking, and to the true interests of his people. His chief ambition seemed to be to change the character of the government once existing and make it similar in character to one of the several minor Asiatic despotisms, such as Johore for instance. The citizens of foreign extraction who had done so much towards the upbuilding of the civilization and material prosperity of the islands were termed by him white invaders, and the king determined that they should have no further voice in the administration of affairs. Systematic attempts were made to demoralize the natives by reviving heathen rites and customs, and to foment race jealousy and hatred under the guise of promoting national feeling. The king was thoroughly vain, dishonest, selfish, and unscrupulous. Scandal and corruption marked his administration from beginning to end. The extravagance and unnecessary expenditures of his government were flagrant. Jobs of the most notorious character were constantly being brought to light through the press. Whenever protests and complaints were made to the king and his appointed cabinet they calmly smiled and complacently asked the complainants the usual question, "What are you going to do about it?"

The first efforts of those who earnestly desired to have a clean, honest government above them were directed to securing a Legislature composed of men having some due regard not only for their own importance as an element in a constitutional government, but who would, to some extent, represent the intelligence and wealth of the islands. Their efforts failed, however. The king was in control of a governmental machine that in its manipulation of elections was calculated to strike envy in the breast of the toughest ward politician of any American ring-ruled municipality. Bribery and ballot-box stuffing prevailed and the king's party was successful.



The Legislative Assembly that was returned held session from April 30 to October 16, a period of 170 days. It voted appropriations to the amount of four and a half millions, although the annual revenues were but two and a half millions. The limits of the people's patience were reached when it was brought to light that the king had received a bribe of \$71,000. for granting the monopoly of opium selling on the islands. This precipitated the crisis, and events took place which are known to history as the Revolution of 1887.<sup>1</sup>

An indignation meeting attended by more than 2500 citizens, representative of every class, condition and race upon the islands, was held in Honolulu, June 30, 1887. Condemnatory resolutions were passed and demands were drawn up to be presented to the king.

The substance of these demands were as follows :

1. That existing defects in the Constitution be at once remedied.
2. That he dismiss his obnoxious Cabinet and select a new one more in sympathy with the interests of the people.
3. That he restore the bribe of \$71,000. he had taken and dismiss from office the official concerned in negotiating same. (Kaae, Register of Conveyances.)
4. That he will not directly or indirectly interfere in any future election of Representatives.
5. That he will not interfere with or attempt to unduly influence Legislature or Legislators.
6. That he will not interfere with the constitutional administration of his Cabinet.
7. That he will not use his official position or patronage for private ends.

Meanwhile the king, in his palace near by, somewhat alarmed at the turn affairs had taken, dispatched a note to the

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<sup>1</sup> "A Sketch of Recent Events, together with a full Account of the Great Reform Meeting." Pamphlet, Honolulu, 1887.

Chairman of the meeting, in which he anticipated several of the demands that were to be made upon him, and promised to accede to them. His note was read publicly and rejected as insufficient. A committee of thirteen waited upon the king, who by this time was thoroughly demoralized, presented the resolutions and demands, and received a written acquiescence to each specifically. Thus was brought about the revision of the existing Constitution, the new one being known as the Constitution of 1887.

### THE CONSTITUTION OF 1887.

The revisers of the king-made Constitution of 1864 accomplished successfully four objects :

- (a) A limit was put to the power of the king ;
- (b) An end was put to personal government ;
- (c) The franchise was extended to foreigners who had hitherto been practically debarred from naturalization ;
- (d) The Ministry was made responsible to the people through the Legislature, instead of to the king as formerly.

The significant features of the new Constitution which brought about these results were as follows :

#### King :

Must act by and with the consent of his Cabinet (exception subsequently made by decision of the Supreme Court in regard to his personal right of veto ;)

Private lands and property of, no longer held inviolable ;

Right of veto limited ; veto nullified by repassing bills by two-third vote ;

Power withdrawn—

To appoint Nobles ;

To dismiss Cabinet (this feature modified by Act of Legislature, February 25, 1891, so that a new King or Queen could dismiss Cabinet of predecessor).

**Legislature :**

Eligibility to, denied

- (a) Any judicial or executive officer ;
- (b) Any contractor or employee of the Government ;
- (c) Any person in receipt of Government salary or emolument ;

Appointment of Legislators to civil office prohibited (exception made in respect to Cabinet appointment.)

Time of convening changed from April to May.

**Nobles :**

Number increased to 40 ;

Elected for six years instead of appointed for life ;

Property qualification,—

Must have \$3,000. of taxable property ; or

Annual income of \$600.

Residence qualification,—

Must have been three years in kingdom.

Salary, none.

**Representatives :**

Number fixed at 24 ;

Salary \$250. per biennial session.

**Ministry :**

Made responsible to Legislature instead of to King ;

Made removable by majority vote of “want of confidence ;”

Eligible to seats in the Legislature, and empowered to vote upon all questions except “want of confidence.”

**Privy Council :**

Powers restricted to concurrence in granting pardons.

**Suffrage :**

Electors of Nobles to have same qualifications as Nobles themselves ;

Electors of Representatives to be—

Male residents (instead of male subjects) ;

Of Hawaiian or European birth or descent (to exclude Asiatics);

Must know how to read and write Hawaiian, English, or some European language (after election of 1887);

Must take oath to support the Constitution and the laws.

Subsequent changes :

Governorships abolished and duties of same divided between the sheriffs and tax-collectors ;

Number of Justices of the Supreme Court reduced to three.

Although Kalakaua had made full accession to the demands of the people, yet the remaining three years of his reign were filled with intrigues and conspiracies to restore autocratic authority to the hands of the King. Nothing but watchfulness upon the part of his subjects thwarted him in his attempts. Upon his death he was succeeded by his sister, the present deposed Queen, Liliuokaulani. For a time it was thought that the Queen would profit by the experience of her brother ; and whatever apprehensions were aroused at the time of her assuming the crown were allayed by the promptness with which she took the oath to support the Constitution of 1887. But as time wore on she leaned more and more to the policy of Kalakaua. There is no doubt but that she was largely influenced by certain adventurers who had succeeded in ingratiating themselves in her favor. Legislative intrigues, in which the Queen was personally concerned, became common again. The appearance upon the scene of the lottery and opium rings<sup>1</sup> complicated matters. Violations of the Constitution became more and more flagrant. The Cabinet that interposed serious objections to these violations was, by the Queen's machinations, voted out of office, and a new one more plastic to her manipulations appointed in its stead.

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<sup>1</sup> *Two weeks of Hawaiian History.* Pamphlet, Honolulu, 1893.



At length, grown contemptuous of the protests of her people, as her brother had grown before her, the Queen took the final step that precipitated her downfall. This was the announcement that she was about to proclaim a new Constitution. Kamehameha V had done the same thing in 1864, with some degree of success. But the times had advanced since then, and the intelligent people of the islands did not propose to have any of their liberties abrogated, nor suffer the demise of representative government under which their lives and property were secure. It needed but the rumor that the constitution which the Queen proposed to put into operation would deprive the people of all voice in the selection of the Upper House, that the Cabinet was to be subject to her will only, that natives were to be exempt from all taxation, and that all whites save those married to native women were to be deprived of the franchise, to arouse the people to decided action.

### THE REVOLUTION OF 1893.

Again the better element came together. A Committee of Public Safety was organized and a mass-meeting of citizens called. The Queen's party consisted, for the most part, of the more ignorant of the natives together with those whites whose hopes of political preferment depended upon the Queen's success. The Queen's advisers became alarmed at the determined opposition that was crystalizing and at the public indignation that was aroused. They persuaded her, after great difficulty, to recede from her intention. The Queen, however, was much more courageous and self-willed than was her brother, Kalakaua, under similar circumstances, and her renunciation was only brought about after much display of angry passion on her part. In public speech, calculated to engender race hatreds and precipitate bloodshed, she complained bitterly of the checks that had been imposed upon her will, and announced her firm determination to promulgate the new Constitution at a more propitious time.

Again was a time of action at hand. At 2 p. m., Monday, January 16, 1893, the largest and most enthusiastic mass-meeting ever held on the islands assembled in Honolulu for the purpose of protesting against the revolutionary aggressions of the Queen. Stirring speeches were made in several languages, all breathing a spirit of Hawaiian patriotism, that looked beyond the Queen to the country and its true interests. The result of the meeting was that the Queen was called upon to abdicate. Her support fell from her and nothing remained but for her to step down and out, which she did with formal protest.

The further action of the people was the formation of an Advisory Council composed of Sanford B. Dole, A. King, P. C. Jones, and W. O. Smith, with the first named as President. The organization of a citizen soldiery was then completed. Next followed the organization of a Provisional Government and the application of this government for annexation to the United States. The Revolution had been so far a bloodless one, but how long it would be so remained to be seen. Minister Stevens, of the United States Legation, landed a force of marines for the protection of the consular property of the United States. The presence of this force did much to allay apprehension and prevent the precipitation of an armed conflict. The revolutionists, however, soon made it evident that they were amply able to maintain themselves, unaided by outside authority. Hasty criticism of the motives of the revolutionary leaders have been made by those little conversant with affairs leading up to the revolt, but were it the purpose of the so-called "Oligarchy" to aggrandise themselves, the question of annexation to the United States would never have arisen. The new government was promptly recognized by the leading nations of the world, including the United States, Austro-Hungary, Sweden, Russia, Belgium, Italy, France, England, Japan, China, Portugal, Spain and Mexico.

The Commission to negotiate a treaty of union with the United States consisted of Messrs. Thurston, Wilder, Castle,

Marsden and Carter. Meanwhile affairs were progressing smoothly with the new government. In anticipation of annexation and in order to smother whatever embers of turbulence and disquiet that might be slumbering (for the incessant agitation of certain whites who have always been the curse of the country, together with the efforts of one English and two native newspapers to discredit the new government and bring it into contempt and disrepute, were bearing fruit in feelings of uneasiness) a request for the establishment of a protectorate over the islands was preferred. Minister Stevens acceded to the request and issued his proclamation February 1, 1893.

At first the efforts of the Hawaiian Commissioners to the United States gave promise of success. Subsequent developments, however, demonstrated the futility of the mission. The friends of Hawaiian royalty were greatly elated in consequence of this failure. It was hard for them to realize that the times no longer tolerated a monarchy of the grotesque or opera-bouffe order in as civilized a society as Hawaii had become, and that the re-establishment of such a monarchy could only be brought about by bloodshed and infractions upon the laws of humanity. A letter from a gentleman of the highest intelligence, born on the islands, educated at Yale, and of conservative disposition, gives as clear a statement of the condition of affairs leading to and existing at the time of the Revolution of 1893 as may be found in any of the many of the published reports. He says :

“Our fate is trembling in the balance. The race question is at the bottom of our troubles, and I think that the people of the South can better understand it than the people of any other section of your country. The natives have, I am sorry to say, deteriorated during the past twenty years, notwithstanding the pains that have been lavished upon them. They seem incapable of comprehending Anglo-Saxon self-government. The last King did his best to ruin his countrymen. His idea was a despotism. The white people, split up as they are by nationalities and creeds, were forced to combine in 1887

and again this year [1893]. The natives are now about two-fifths of the total population, pay about one-seventh of the taxes, own about one-seventh of the land, cast two-thirds of the vote, and occupy two-thirds of the paid offices. All the business and agricultural enterprises in the country are carried on by Americans or by Europeans. No people are more susceptible than the Kanaka to be captured by carpet-baggers who flatter them and work upon their race jealousy. Whatever fate is in store for us we are determined never again to submit to monarchy. Nearly all the white people of the islands and the better class of the natives are fully convinced that annexation to the United States is the only satisfactory solution for us. The Germans and the Portugese are solidly with us. Only the Tory English, the lottery and boodle Americans, Court parasites and reactionary natives oppose it. Out of 13,000 voters 6,000 have already signed the rolls of the Annexation Club. We do not want these islands tilled by contract labor, filled with the mongrel classes of China, and governed by so-called sugar kings. Of the population at present, 20,000 are white, 40,000, natives and half-casts, and about 30,000, Asiatics. The whites own nine-tenths of the property. . . ."<sup>1</sup>

The Constitution which Liliuokaulani proposed to promulgate has only recently come to light, and may be found in the report of Commissioner Blount,<sup>2</sup> special envoy of the United States to the islands. That the fears of those who undertook the revolutionary movement were well grounded may be seen in the wide extension of power which the Queen arrogated to herself. A brief summary of this extension may be given as follows :

**Military :**

Unlimited control of, vested in the Queen (Art. 26).

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<sup>1</sup> Letter of Hon. W. D. Alexander, Ex-Surveyor General of the Hawaiian Kingdom, of date May 23, 1893.

<sup>2</sup> Page 581, *et seq.*



**Appointment :**

Queen appoints,—

All foreign ministers (Art. 29);

The Regent who shall rule pending her absence or during the minority of her heir (Art. 33);

Privy Council with full privileges of dismissing them at will (Art. 41);

Members of the Cabinet (Art. 42);

Members of the House of Nobles (Articles 45 and 57);

Justices of the Supreme Court, and other Courts of record (Art. 71);

President of the Court of Impeachment when her court officers are tried (Art. 68);

Governors of the several islands (Art. 73).

**Executive Authority :**

Exclusively vested in Queen (Art. 31);

Declared Sovereign of all the chiefs and of all the people.

“The Kingdom is hers” (Art. 34).

**Legislative Authority :**

No law valid without her approval (Art. 31);

Legislative power of the three estates vested in her (Art. 45).

**Immunities :**

Her person to be held sacred and inviolable (Art 31);

Also her private lands and property (Art. 29);

Can not be sued or held accountable in any court or tribunal of the realm (Art. 40);

Responsibility for her acts not to be placed with her but with the Minister signing same (Art. 42).

**Special Privileges :**

To coin money and regulate currency (Art. 26);

To issue all orders, titles and distinctions (Art. 25);

Can declare Martial law (Art. 37);

Amendments to Constitution void without her approval (Art. 81).

It must be remembered that the natives of Hawaii have no grievances against Anglo-Saxon civilization. There have been no wars of extermination as in the case of the American Indian, no oppressive tyrannies. Side by side with the natives, the foreigners have been contented to dwell under native rulers so long as stability and human rights were assured. Property values now existing in the islands have been created by the intelligence of the foreigners. Through the efforts of the Missionaries more Hawaiians are coping against extinction, in face of approaching civilization, than any other of the once savage Polynesian races. American interests predominate over all others. The total annual taxes amount to \$537,757.30, of which American residents pay \$140,000., the remainder being divided among Hawaiians, Chinese, British, Japanese, Germans, Portuguese, in the order named.

The rejection of the treaty of annexation was a great blow to the Americans of the islands who hailed with joy the idea of once more having the old flag unfurled above them. But provisional government continued to maintain itself. One by one it surmounted all difficulties in the way of intrigues, foreclosure of public debt, treacherous uprisings of the Queen's followers, etc.

### THE REPUBLIC OF HAWAII.

Independence soon replaced annexation as the uppermost thought in the Hawaiian mind. A government constitutional in its nature, one able to preserve the hard-won civilization of the islands from disintegrating and corrupting forces, one able to prevent the intelligent few from being overwhelmed by the ignorant many to the calamity of both, this was the problem Hawaii was called upon to solve. And well has she risen to the occasion. She has intelligently profited by the constitutional experiences of other nations, and in several respects the constitution, under which as the Republic of Hawaii she is to-day governed, is an advance upon all exist-

ing constitutions. She has solved the problem of placing the exercise of governmental authority where it rightfully belongs—with those whose intelligence and thrift make them most vitally concerned in the stable and wise administration of law. And yet no right which enlightened liberty has wrested from absolutism, in the centuries of modern civilization, is denied to the humblest Hawaiian citizen, notwithstanding this comparative concentration of power.

Hawaii's present constitution and the Hawaiian Republic originated in an act of the Provisional Government approved March 15, 1894. The Constitutional Convention convened at Honolulu May 8, and July 4, following, the Constitution was promulgated. As in the case of our own State of Mississippi, this Constitution was not submitted to the people for ratification. The Convention acted in both a sovereign and a representative capacity, and itself ratified and promulgated.

The Hawaiian Constitution of 1894 guarantees certain "inalienable rights" of person and property; religious freedom; freedom of speech and of the press; the right of meeting and of petition; the right of habeas corpus; the right of trial by due process of law; and security from unreasonable searches and seizures of person, house, papers and effects. Yet the Legislature may by law restrict and limit terms of residence and business or employment of all persons, of any class or nationality, coming into the Republic. It prohibits slavery, lotteries and appropriation of public moneys to private and sectarian schools; specifies name of government, extent of territorial jurisdiction, etc. Its most significant features, which appeal to the student of constitutional governments and developments, are given in the following synopsis:

*Citizenship:*

General, all persons native born or naturalized;

Special, all persons not already citizens aiding in the establishment and maintenance of the provisional government;

Qualifications to be possessed by aliens applying for,—

Two years' residence in the Islands ;

Applicant must intend permanent residence ;

Must be able to read, write and speak the English language ;

Must be of good moral character and not a refugee from justice ;

Must possess property valued at not less than \$200. ;

Must take oath of allegiance.

*Denization :*

Letters of, granted by Executive Council ;

Confers all rights of citizenship except suffrage.

*Supreme Power of the Republic vested in :*

Executive ;

Legislature ; and

Judiciary.

**THE EXECUTIVE POWER :**

*The President,—*

Must be not less than 35 ; native born, or 15 years a resident ; and a citizen ;

Term of Office, six years ;

Ineligible to re-election ;

Elected by Legislature ;

Appoints,—

Members of Cabinet (with consent of Senate) ;

Boards of Health, Education, Immigration, Prison

Inspectors (with consent of the Cabinet) ;

May Remove,—

Members of the Cabinet (with consent of Senate) ;

Any Cabinet Member (with approval of three Cabinet Members.

May Convene,—

Legislature or Senate separately.

*The Cabinet,—*

Act as Counsellors to the President ;



- Are appointed by the President ;
- Are *ex-officio* members of both Senate and Legislature without power of voting ;
- Succeed to the Presidency, in case of death, disability, or absence of the Chief Executive, in the following order :
  - (1) Minister of Foreign Affairs ;
  - (2) Minister of the Interior ;
  - (3) Minister of Finance ;
  - (4) Attorney General.

#### THE LEGISLATIVE POWER :

##### *The Senate,—*

Number of Senators, 15 ;

Term of Service, six years ;

##### Qualification of Senators,—

Must be male citizens, at least 30 years of age ;

Able to read and write English or Hawaiian ;

Possessed of property valued at \$3,000. ; or

Receive an income not less than \$1,200.—year preceding election.

##### *The House of Representatives,—*

Number of Representatives, 15 ;

Term of Service, two years ;

##### Qualification of Members,—

Must be male citizens, not less than 25 years of age ;

Able to read, write and speak English or Hawaiian ;

Possessed of property valued at not less than \$1,000. ;

Or income of \$600.—year preceding election.

##### *The Council of State,—*

Number of Members, 15 ;

Selection,—five by House, five by Senate, and five by President with approval of Cabinet ;

Term of Office, to end of Legislature Session after appointment ;

##### Powers,—

Advisory to the President ;

Appropriating public moneys during adjournment of Legislature when great public necessity arises ;  
Pardon with and by advice of President and Cabinet.

**THE JUDICIAL POWER :**

Vested in Supreme and Inferior Courts ;  
Also in Senate (Impeachments) ;  
Supreme Court, Judges of contested elections to Legislature.

**ELECTIONS :**

Electors,—

Privileged against arrest on election day except for breach of peace or felony ;

May when entitled to vote for more than one candidate distribute his vote or concentrate it upon one ;

Qualifications,—

Electors of Representatives must be,—

Male citizens of at least 20 years of age ; or

Must have special letters of denization ; or

Must have certificate of service ;

Must have complied with registration laws ;

Must have paid all taxes due by him to the government ;

Must be able to read, write and speak Hawaiian or English.

Electors of Senators,—

Must possess all qualifications as above ; and

Must own real property valued at \$1,500., or personal property valued at \$3,000., or have income of \$600. per annum.

**NATURALIZATION :**

Exclusively under jurisdiction of Supreme Court.

Qualifications of applicant,—

Two years residence and intent to become permanently a citizen ;

Shall be able understandingly to read, write and speak  
the English language ;  
Must be a citizen of a country having express treaty  
stipulations with Hawaii ;  
Must be of good moral character ;  
Must be engaged in lawful business ;  
Must own property valued at \$200. ;  
Must take oath of allegiance.

An intelligent writer has said in reference to the present Hawaiian Constitution :

“Not often, in the history of Constitution-making, has a document of this character been more firmly and more judiciously adapted to the precise conditions under which it would have to go into effect.”<sup>1</sup>

That it is such is due in no small part to the extraordinary good judgment of Hawaii's first President, Sanford B. Dole, who in some of the most critical of situations, in which of late years he has been repeatedly placed, seems to have done exactly the right thing at the right time, using power entrusted to him with rare wisdom and unselfishness.

Under the new Constitution the nightmare of Monarchy no longer disturbs Hawaiian dreams of the future. Republican government is assured to Hawaii whether it be as an independent Republic or as a territorial annex to the United States. For indeed the people of Hawaii do not altogether consider the cause of annexation as altogether lost, else there would not appear in the Hawaiian Constitution the significant clause, “The President, with the approval of the Cabinet, is hereby expressly authorized and empowered to make a treaty of political or commercial union between Hawaii and the United States of America, subject to ratification by the Senate.”

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<sup>1</sup> Albert Shaw in *Review of Reviews* for September, 1894.

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II

THE CITY GOVERNMENT  
OF  
BALTIMORE



JOHNS HOPKINS UNIVERSITY STUDIES  
IN  
HISTORICAL AND POLITICAL SCIENCE

HERBERT B. ADAMS, Editor

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History is past Politics and Politics are present History—*Freeman*

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FOURTEENTH SERIES

II

THE CITY GOVERNMENT  
OF  
BALTIMORE

By THADDEUS P. THOMAS, PH. D.

*Associate Professor of History and Sociology in the Woman's College of Baltimore*

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## PREFACE.

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This monograph presents an outline of the past development of Baltimore's municipal organization, and concludes with a brief description and critique of its present governmental framework. It deals mainly with the administrative and legislative machinery of the city, and attempts to tell what this has been, is, and should be. The subject is of unusual importance at present because a party has just come into power after an interval of twenty-eight years with the avowed purpose of reforming the city government.

I have received personal assistance from various sources on many special topics, but my grateful acknowledgments are especially due to Dr. Herbert B. Adams and Dr. Bernard C. Steiner, of the Johns Hopkins University, for valuable suggestions when the work was first undertaken; to Mr. George C. Wedderburn, City Librarian, and Mr. John G. Gatchell, Librarian of the Maryland Historical Society; and above all to Dr. Jacob H. Hollander, of the Johns Hopkins University, who consented to read the manuscripts, and whose suggestions were of peculiar value on account of the special studies he has made in connection with the same subject.

T. P. T.



# THE CITY GOVERNMENT OF BALTIMORE.

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## I.

### BALTIMORE TOWN, 1730-1797.

The advantageous commercial situation of Baltimore predestined it to be a great city. Yet it was not laid out till 1730, nearly a century after the founding of Maryland. Scores of other towns had meantime been created and had perished. One of the favorite occupations of the provincial Assembly of Maryland seems to have been the creation and demolition of towns by legislative enactment. Their establishment was, of course, not dictated by mere caprice, but was designed principally to furnish places of landing for the exchange of products between the agricultural and commercial classes. In 1683 an important "Act for the Advancement of Trade" had established a number of towns as centers of traffic, commerce and financial operations.<sup>1</sup> But the supply soon outran the demand, over one hundred being created within a few decades, and many of them which had little or no existence except on paper were afterwards abolished.<sup>2</sup> The survivors were comparatively few in number. The method of creating

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<sup>1</sup> Bacon's *Laws*, 1683, ch. 5.

<sup>2</sup> For an admirable account of these early towns see Wilhelm, *J. H. U. Studies*, Third Series, p. 401.



and governing most of these towns was quite similar to that about to be described in the case of Baltimore.

There was an element of accident in the location of Baltimore. Had a single individual named John Moale possessed prophetic insight, the half-million inhabitants of the city would to-day be occupying a somewhat different situation. Mr. Moale owned land on the south side of the Patapsco River which he valued highly on account of the iron-mines it contained. When it was proposed to lay out a town on Moale's Point, he hastened to the Assembly at Annapolis, of which he was a member, and had the proposal defeated. After Mr. Moale had taken this false view of his own interests, the petitioners who wished to build a town requested that it might be laid off on the *north* side of the Patapsco. Accordingly, on August 8, 1729, there was passed "An Act for erecting a Town on the North side of Patapsco, in Baltimore County, and for laying out in Lots, Sixty Acres of Land, in and about the place where one John Fleming now lives."<sup>1</sup>

By this act seven Commissioners were appointed to purchase the land and to lay it out into sixty equal lots. The owners first chose a lot, after which others were free to choose the remaining lots. In case the one who selected a lot should fail to build thereon within eighteen months a house covering four hundred square feet, any other person could enter upon the lot, after paying the sum first assessed. This was forty shillings an acre, and each settler paid his share to Charles and Daniel Carroll, the original owners of the land, either in money, or in tobacco at the rate of a penny a pound. Thus the original site of Baltimore cost something less than six hundred dollars in our present money. The act also empowered the Commissioners to appoint a clerk to make true and impartial entries of their proceedings, "which said entries they shall cause to be made up in a well bound book and

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<sup>1</sup> Bacon's *Laws*, 1729, ch. 12.

lodged with the Clerk of Baltimore County Court for the inspection of any person.”<sup>1</sup>

In January, 1730, the town was laid off, beginning at the junction of what are now known as Pratt and Light Streets.<sup>2</sup> The growth of the new town was slow. After twenty-two years had elapsed it contained only twenty-five houses. By an act of the session of 1745 Baltimore Town and Jones's Town (or Old Town), which had been erected on the east side of Jones's Falls, were united by the Assembly into one town, on joint petition of their inhabitants. Other additions were made from time to time, one of the most important being that of Fell's Point. The Act of 1745 is important as showing us more fully than any other enactment the nature of the early government of the town. But few powers were granted to it, and these were vested in Commissioners appointed by the government at Annapolis and forming a close corporation.

The following were the principal provisions of the Act of 1745.<sup>3</sup> Seven Commissioners were appointed to see this and former acts relating to the towns put into execution, to cause the towns to be carefully surveyed, and to have the lots surveyed, bounded and numbered. They were to settle all disputes about the boundaries of lots. On the death, removal, or refusal to act of any Commissioner, the major part of those remaining appointed another to serve in his stead. They were empowered to employ a clerk to keep a book containing the proceedings of their meetings, describing the lots, and giving the names of those who took them up. The clerk was removed at their pleasure. They also had power to assess the inhabitants of the town “by even and equal pro-

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<sup>1</sup> This yellow-backed volume is still in existence, and is carefully preserved by the City Librarian. It contains the records of Baltimore Town from 1729 to 1747. The later records were kept in several old books and afterwards copied into one book, which is also in the City Library, but which unfortunately contains many serious omissions. These records of Baltimore Town have never been published.

<sup>2</sup> Griffith's *Annals of Baltimore*, 17.

<sup>3</sup> Bacon's *Laws*, 1745, ch. 9.

portion, the sum of three pounds yearly, to be paid to their clerk."

Baltimore Town continued under this form of government until it became a city, though important modifications were made in 1782 and 1783. The Assembly passed at various times the laws necessary for the regulation of its internal affairs.<sup>1</sup> The records of the town are made up principally of the proceedings of the Commissioners in regulating the boundaries of lots, laying out new streets and filling vacancies in office. They elected annually such officers as a weigher of hay, corder of wood, measurer of grain, inspector of flour, gauger of liquors, culler of staves, and clerk of the market. The general powerlessness of the Commissioners is strikingly illustrated by the story of the town fence of Baltimore. It seems that the fence had been erected as a barrier against imaginary dangers. At any rate the only attack ever made upon it was from the inside. During the winters succeeding its erection some of the inhabitants secretly appropriated large portions of it for firewood. The remainder was of course rendered useless and was sold by the Commissioners

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<sup>1</sup>The following extract illustrates the detailed manner in which this was done, as well as the nature of the regulations in regard to fires at that early period:

"And for prevention of any damage by fire in the said town, Be it enacted, That any inhabitant therein who shall, after the first day of December next ensuing, permit his, her or their chimney to take fire, so as to blaze out at the top, shall forfeit and pay the sum of ten shillings current money for every such offense; and any person having a house in the said town with a chimney, and in use, who shall not after the said first day of December, keep a ladder high enough to extend to the top of the roof of such house, shall also forfeit and pay ten shillings current money; which said fines shall be recovered by and in the name of the said Commissioners, or the major part of them, before a single magistrate, as in the case of small debts; and when recovered shall be appropriated by the said Commissioners, or the major part of them, to some building or improvement in the said town, such as to the repair of the bridge or making and repairing a public wharf; and that their clerk shall keep an exact account of all fines arising by this act, and how the same shall have been disposed of." (1747, ch. 21.)

to Mr. Nicholas Rogers. The clerk was directed, with apparently significant promptitude, to deliver this rapidly vanishing property to the purchaser the next morning. Now the Commissioners knew who the offenders were and made out a partial list of their names. They started to prosecute one of them, but gave up the attempt when it was found that they probably did not have the power. For the Commissioners of Baltimore Town were an unincorporated body, and always remained so.<sup>1</sup>

It was not till the decades just preceding the Revolutionary War that Baltimore Town began to take strides towards the commercial supremacy of the Chesapeake. Joppa, on the Gunpowder River, was until that time its formidable rival. Joppa had been made the county-seat of Baltimore County in the year 1712. But in 1767 that honor was transferred to the younger but more thriving town of Baltimore, and Joppa afterwards vanished so completely that even its site was for a long time unknown. Baltimore in turn became the center of trade for all the surrounding region. By the outbreak of the Revolution the twenty-five houses of 1752 had increased to five hundred and sixty-four. The number of inhabitants was 6,755. The Revolutionary period aided instead of retarding its progress, for the cutting off of foreign commerce gave a stimulus to home industry, and the inhabitants exerted themselves with commendable energy. The following extract from the reminiscences of a newspaper writer gives an idea of the self-conscious stage of development the town had attained at this period: "It was a treat to see this little Baltimore Town just at the termination of the War of Independence—so conceited—bustling and debonair—growing up like a saucy, chubby boy, with his dumpling cheeks and short, grinning face fat and mischievous, and bursting, incontinently, out of his clothes in spite of all the allowance of tucks and broad selvages."<sup>2</sup> It was time for this rapidly

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<sup>1</sup> Town Records for March 9 and November 21, 1752.

<sup>2</sup> Quoted in Lucas' *Picture of Baltimore*, published in 1832.



growing community to have the deficiencies of its system of government remedied. Some attempts were made by the Assembly in this direction during the two years following the surrender at Yorktown.

In 1782<sup>1</sup> an act was passed naming seven persons as *Special Commissioners*, "with full power to superintend the leveling, pitching, paving and repairing the streets, and the building and repairing the bridges within said town." Before this even the principal street was only partly paved, and was impassable during certain periods of the year.<sup>2</sup> Another section provides that the Commissioners of Baltimore Town should deliver to the Special Commissioners "all monies paid to them or in their hands by virtue of their powers for repairing the streets of said town." The Special Commissioners were required to render an account of all their receipts and expenditures to the Commissioners of Baltimore Town, and to publish it annually in the newspapers. And they were given power to fill vacancies in their own number, thus becoming a self-perpetuating body.

There seems to have been dissatisfaction with this last provision, for it was changed during the next session by an act<sup>3</sup> which made many important additions to the previous act. The new law first provided for levying taxes for the purposes of the Special Commissioners. A tax was laid on every front foot of the streets paved or to be paved (repealed in 1791), and a tax not exceeding two shillings and sixpence on every hundred pounds of assessed property; while various specific taxes were levied on carriages, carts, horses, billiard-tables, chimneys catching fire, tavern licenses, etc.<sup>4</sup> The most remark-

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<sup>1</sup>*Acts of Assembly*, April session of 1782, ch. 39.      <sup>2</sup>Griffith's *Annals*, 95.

<sup>3</sup>*Acts of Assembly*, November session of 1782, ch. 17.

<sup>4</sup>By a supplementary act (1791, ch. 59) the Special Commissioners, in connection with the Wardens of the Port, were empowered to raise three thousand five hundred pounds annually by lottery. Two-thirds of the proceeds were to go to the Wardens of the Port and one-third to the Special Commissioners. The pernicious method of raising revenue by means of lotteries was continued for many years.

able provision of the new law, however, was that by which the Special Commissioners, instead of being a self-perpetuating body, were to be elected every five years by a miniature electoral college. This was doubtless in conscious imitation of the method then employed in electing senators to the Maryland Assembly,<sup>1</sup> and soon to be adopted by the new federal government of 1789 as its method of electing the President. The inhabitants who had real property in the town to the value of thirty pounds (or enough to qualify them to vote for members of the lower house of the Assembly) elected by ballot nine persons to be electors of the seven Special Commissioners. The electors could choose the Special Commissioners either out of their own body or from the inhabitants of the town at large. They were directed to so choose them that the several parts of the town should as nearly as possible be equally represented—for there existed a certain degree of jealousy between the inhabitants of the different settlements which had been united to form the town, and this continued even after it had become a city. The Commissioners must have real or personal property in the town above the value of five hundred pounds. They could fill vacancies in their body till the next election.

Another important provision of this law made the Special Commissioners a body corporate, with all the accompanying privileges, while the Commissioners of Baltimore Town remained an unincorporated body. The Special Commissioners appointed a clerk, a collector of taxes, and a treasurer. The inhabitants elected annually three comptrollers, who were to examine and approve or disapprove of the accounts of the Special Commissioners. It was also enacted that the comptrollers should ascertain the sum to which the Special Commissioners were entitled “for the time employed in the discharge of the duties enjoined them by this act, and that the

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<sup>1</sup> See *Maryland Constitution and Form of Government*, section 14.

sum agreed upon and certified by the said comptrollers be paid said Special Commissioners by the treasurer."

By a similar act in 1783,<sup>1</sup> nine *Wardens of the Port* were appointed, but with the provision that they were thereafter to be elected every five years by the electors of the Special Commissioners. The property qualification for Wardens of the Port was one thousand pounds. They, too, were given the powers of a corporation and could fill vacancies in their own body till the next election. It was their duty to give their consent before wharves could be made or extended, to survey the river and harbor, remove obstructions, and impose a duty of a penny a ton on every vessel entering or leaving the port. They appointed a clerk and a treasurer, and the latter published his accounts annually. The wages of the Wardens of the Port, the commission to their treasurer and the salary to their clerk were paid out of the money raised by virtue of the act. There was at this time no public wharf but one of about one hundred feet on Calvert Street, and only three of the private wharves extended over two hundred feet.

One other important measure for the government of the town was passed in the November session of 1784. The Commissioners of Baltimore Town were empowered to erect street-lamps and to have them lighted. They employed constables and watchmen to keep watch and ward, to prevent fires and burglaries, and to arrest disorderly persons. Three constables and fourteen watchmen were appointed the first year. Each Commissioner was granted the powers of a justice of the peace, but this provision was repealed in 1793. To meet the necessary expenses the Commissioners were authorized to levy a tax not exceeding one shilling and sixpence on every hundred pounds worth of property in the town. They appointed a treasurer who kept an account of their expenditures, which was examined and approved or disapproved by

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<sup>1</sup>*Acts of Assembly*, June session of 1783, ch. 24.

the comptrollers. The Commissioners were paid for their services in the same manner as the Special Commissioners.

It is not surprising that this complicated and cumbersome system of government should have caused some dissatisfaction. There were conflicts between different boards. Complaint was made that citizens could not tell to which one to go for a correction of grievances. Besides, the people were growing tired of government by Commissioners, and they became gradually more desirous of having the town incorporated. A brief account of the two unsuccessful attempts at incorporation in 1784 and 1793 will not be devoid of value.

The first proposed act<sup>1</sup> was drawn up by a committee which had been elected by the citizens for that purpose. It was preceded by a number of resolutions, one of which declares that when "they see the total want of order, police and good government pervading almost all parts of this great commercial town, they cannot but be of opinion that the power of regulating our own internal affairs is absolutely and essentially necessary, not only to the well being, but to the being itself thereof." And for this reason they urged the inhabitants to apply to the Assembly for a charter. The proposed corporation was to consist of a Mayor, Recorder, Aldermen and a Common Council. The executive and judicial powers were to be vested in the first three, and the legislative powers in the Common Council, which was to consist of two branches, one elected by the people and one by electors. The two branches were to elect by joint ballot an Alderman from each ward, and these Aldermen and the Council were to elect the Mayor. The Mayor and Aldermen were to appoint the Recorder, and with him were to constitute a Court of Hustings to try petty crimes and breaches of the peace. It seems the plan was approved by a town meeting, but it did not give general satisfaction, and fortunately it was finally dropped.

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<sup>1</sup> Broadsides in the Library of the Maryland Historical Society, Vol. I, 29.



The proposed act of the November session of 1793<sup>1</sup> has a general resemblance to the act which was finally adopted three years later, and its provisions need not be given here. It was passed by the Assembly to go into effect "if the same shall be confirmed by the General Assembly at their session in November, 1794, and not otherwise." This was never done. The inhabitants of Fell's Point, "the mechanical, the carpenters and republican societies, then lately formed for other purposes, took part in opposition, and it was not carried into effect."<sup>2</sup>

But Baltimore Town was growing with amazing rapidity. In 1790 it had a population of 13,503. Six years later it had almost doubled, and by 1800 the total number of inhabitants was 31,514. This period was one of great commercial prosperity. It is true that there had been a temporary languor during what Fiske has well termed the "Critical Period of American History." But that passed away with the adoption of the Constitution in 1789, when the loosely leagued states were welded more firmly together and commerce was furnished the tonic of an increased confidence. The European wars soon afterwards threw the carrying trade into the hands of Americans, and Baltimore Town profited eagerly by the opportunity. It was a town no longer, except in its anomalous and antiquated system of government. This system was to be swept away by the third proposed act of incorporation, the adoption of which converted Baltimore Town into Baltimore City.

Whatever the government of Baltimore Town may have been, it was not local self-government. It was not local government, for the town was governed largely from Annapolis. It was not self-government, for what few governmental powers were localized were invested in officers not chosen by the

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<sup>1</sup>This is given in a pamphlet bound together with others in Vol. 21 of the Library of the Maryland Historical Society. It contains a vigorous introductory address by "A Fellow Citizen," who strongly favors the adoption of the act.

<sup>2</sup>Griffith's *Annals*, 141.

people. The chief officers were the Commissioners of Baltimore Town, the Special Commissioners, and the Wardens of the Port. The first body had been a close corporation since the founding of the town, entirely irresponsible to the people. The other two bodies were elected by nine electors, who were elected by the people only once in five years. The powers of all three were narrowly limited by the State Assembly, which regulated most of the matters of local government, usually after a petition had been sent in by the inhabitants. At first the town had no power even to remove nuisances. The Assembly in 1768 spent part of its time passing an act in virtue of which Thomas Harrison was to remove a marsh in Baltimore Town. Two years later another act was passed to give Thomas Harrison further time to effect the removal of the said nuisance. And two years after that a third act was passed to give him still more time for the accomplishment of the same purpose. It is not denied that the marsh was large, nor that Mr. Harrison was reasonably industrious. But under a proper system of local government the marsh need not have been a nuisance to the General Assembly of Maryland. It is a fundamental political principle that only that which cannot be best done at home should be assumed by the central government. But the General Assembly passed laws in reference to throwing dirt into the streets of Baltimore, laws to regulate the size of the chimneys of the town, the width of the wheels of its vehicles, the enclosure of its geese and pigs, and the amount of its tax on dogs. The difficulty of governing a town by an Assembly which already has the government of a state in charge grows with the growth of the town. When such a government becomes too vexatious and inefficient, the dawn of home rule is at hand. When the incorporation of the town took place in 1797, there was an enlargement of the power of the people to choose their own officers, and a decrease in the direct interference of the state government—though the latter evil was only mitigated and not entirely removed.

## II.

## BALTIMORE CITY SINCE 1797.

The development of Baltimore's corporate government has been evolutionary rather than cataclysmic. It has been free from those municipal upheavals which overthrow old charters and put new ones into operation. Each period seems to merge gradually into the succeeding one. Nevertheless, there are two dates in the evolution of the city which may be taken as the natural division-lines of its political history. The first is the year 1833, which marks approximately the complete triumph of the democratic principle in the government of the city as well as the nation. The second is the year 1867, when a new state constitution was adopted and a new era inaugurated after the political turmoil that accompanied the Civil War.

On the very last day of the year 1796, the act of incorporation of Baltimore City was approved; and consequently the new government was not put into operation until early in 1797. There was considerable opposition to the act among some of the citizens, and the inhabitants of the Point or Deptford Hundred were placated by an exemption from any taxation for the purpose of deepening the upper part of the harbor. The act was an experiment designed to remain in force for only a year, but the next session of the Assembly made it perpetual.

The preamble of the act recites that "it is found by experience that the good order, health, peace and safety of large towns and cities cannot be preserved, nor the evils and accidents to which they are subject avoided or remedied, without an internal power competent to establish a police and regulation fitted to their particular circumstances, wants and exigencies." The city was divided into eight wards, with a provision for an increase in their number when the population should increase.

The City Council was made to consist of two Branches. The First Branch was made up of two members from each ward, elected annually, residents of the town three years preceding their election, and assessed for purposes of taxation to the amount of one thousand dollars. The election was *viva voce*.

The Second Branch consisted of eight members chosen from the different wards, twenty-five years of age, residents of the town four years previous to their election, and assessed to the amount of two thousand dollars. Their term was two years. Neither the Second Branch nor the Mayor, whose term was also two years, was elected directly by the people. Each ward, at the time of electing the members of the First Branch, elected also an elector of the Mayor and members of the Second Branch. These eight electors met one month later and chose a Mayor and the eight members of the Second Branch.

No person was eligible for Mayor who was not twenty-five years of age, ten years a citizen of the United States, and a resident of Baltimore for five years preceding the election. In case of a tie in the election for Mayor or for a member of the Second Branch, the electors determined the choice by lot. No person could be an elector of the Mayor and at the same time a member of the First Branch.

Three-fourths of the councilmen formed a quorum. Their deliberations were public, and they were required to keep a journal of their proceedings and enter the yeas and nays on any question at the request of any member. If the Mayor returned an ordinance in five days without his approval, it failed to become a law unless sustained by three-fourths of both Branches. The method of appointing the officers of the corporation was peculiar. The Second Branch nominated two citizens for each office, and the Mayor appointed and commissioned one of them.

The Mayor was given the powers of a justice of the peace, except as to the recovery of small debts. He could call upon any officer of the city for a statement of his accounts as often



as he deemed necessary. He was required to make an annual report of the condition of the city, "with an accurate account of the money received and expended, to be published for the information of the citizens."

The corporation was granted the usual powers in regard to regulating markets, streets, lots, bridges, night-watches, fire-companies, sewers, preventing and removing nuisances, caring for the health of the city, and attending to the navigation of the Patapsco, within the limits of Baltimore and four miles thereof; the right to lay and collect taxes, and to pass all ordinances necessary to give effect to all the powers vested in the corporation.

Such was the charter of the infant city. It satisfied a long felt need, and, on the whole, fulfilled its purpose admirably. Its most noteworthy feature was an anomaly born of the undemocratic spirit of the times. It consisted of the requirement that candidates for Mayor and the Council should have high property qualifications, and that the Mayor and Second Branch should be chosen by electors instead of by the people. The electoral device was a part of the Maryland Constitution, and had been unfortunately adopted as a part of the national constitution in 1789. The principle of democracy had not yet triumphed in America. John Adams had just been elected President over Thomas Jefferson by a majority of three electoral votes. If the people had reflected upon the lesson of that and the previous election, they could have seen even at that time the futility and unfairness of the electoral system. It was always futile, for the electors did not exercise an independent choice, being pledged in advance to vote for certain candidates. It was sometimes unfair, since the choice of a majority of the states or wards might fail to be the choice of a majority of the people. The electoral system was preserved for some time in the city because the aristocratic principle upon which it was based could be so easily evaded. We shall see, however, that the system was partly abolished and the high property qualifications for office were much reduced in the year 1808.

Meanwhile let us see how the city government was organized under the new charter. In the first year of its existence several of the most important departments were established. An ordinance was passed providing for the appointment of a Register and a Treasurer. Three Commissioners of the Watch were appointed to employ watchmen and attend to lighting the city. Nine Commissioners of Health were appointed to look after the health of the city. The number was reduced to five in 1801 and to four in 1803. Five persons were appointed City Commissioners, their principal duties being to pave the streets, make and repair sewers, and to fix the lines of the streets and the boundaries of the lots. All these officers were appointed in 1797, as well as many others, such as a harbor-master, clerks of the markets, corders of fire-wood, assessors and a collector of taxes, and weighers of hay.<sup>1</sup>

It is not the purpose of this paper to give a detailed description of the many changes in the powers and duties of all the city officers, but merely an outline of the more important alterations and additions that took place from time to time. The first of these occurred in the year 1803, when commissioners were appointed "for introducing a copious and permanent supply of wholesome water into the City of Baltimore." A contract for this purpose was soon made with the Baltimore Water Company, which was organized about this time and incorporated in 1808. It drew its water supply from Jones's Falls. In 1807 the City Commissioners, who had been reduced to three in number, were authorized to appoint and superintend the night-watch in addition to their other specified duties. In 1809 a further consolidation of duties took place. Four persons were appointed to be "City Commissioners and Commissioners of Health," and exercise all the powers that had belonged to the two bodies separately. A few years later the number was changed to three.

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<sup>1</sup> See ordinances of 1797.

In the meantime, in 1808, an important amendment to the act of incorporation had gone into effect. The preamble to the amendment stated that in the act of incorporation "certain principles are established and qualifications of the members of the City Council of the City of Baltimore, which experience hath proved to be inconvenient in their operation, and repugnant to the wishes of a great portion of the inhabitants of Baltimore, who have by their petition to this General Assembly, prayed for an alteration of the same." Accordingly it was provided that each ward should elect by ballot, every second year, a resident of that ward to be a member of the Second Branch. While the members of the Second Branch, like those of the First Branch, were thus elected directly by the people, the Mayor continued to be chosen by the electors till 1833; but the number of the latter was raised from eight to sixteen. These electors were chosen every second year, two from each ward, by ballot.<sup>1</sup> The property qualification of the Mayor was made five hundred dollars. The qualification of members of the First Branch was reduced from one thousand dollars to three hundred dollars; of the Second Branch, from two thousand dollars to five hundred dollars. Nominations of officers, which had before been made by the Second Branch, were henceforth to be joint nominations of the First and Second Branches. All of these provisions were dependent on a sort of aristocratic referendum, in accordance with which the act was submitted, not to the people directly, but to a convention of sixteen delegates chosen by them, two from each ward, and having full power to adopt or reject the act. It was ratified by this convention on February 8, 1808.

In 1813 an ordinance was passed appropriating a sum of money for the improvement of navigation, and three Wardens of the Port were appointed for building and repairing wharves,

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<sup>1</sup> It had previously been enacted that all elections in the city should be by ballot (1805, ch. 108). This change greatly reduced the election disturbances common at that time.

superintending the work of the mud machines, and performing similar duties. In 1816 the Mayor was authorized to contract with the Gas Light Company of Baltimore for lighting the city. This was the first company in the United States to furnish a city with a supply of gas.

At the session of 1816 the Assembly passed an act to annex the portion of Baltimore County known as "The Precincts" to Baltimore City. The part added was exempted from the city tax of two dollars on the hundred pounds until there should be at least five dwelling-houses on each acre of land.<sup>1</sup> This action was due to the fact that it seemed unjust to tax, "for watching, lighting, and cleaning the streets, those parts where no streets existed, save upon the map of the city."<sup>2</sup>

This increase of territory and population caused the number of wards to be increased to twelve by an act of the session of 1817.<sup>3</sup> By the same act two-thirds of each Branch of the City Council were constituted a quorum to transact business. The Mayor nominated and, with the advice and consent of the two Branches, appointed all officers, except the Register and the clerks employed by the city. The Register was appointed biennially by a convention of the two Branches and commissioned by the Mayor, being removable, nevertheless, at pleasure by a convention of the two Branches. The electors of the Mayor were made twelve, the same in number as the wards of the city. For the purpose of promoting great or permanent improvements the city was empowered to issue stock or borrow money upon the credit of the corporation, not to exceed one million dollars. This limit was soon extended, and a large debt was accumulated during the next two decades.

The provision of the ordinance uniting the City Commissioners and the Commissioners of Health in one board was repealed in 1820, and the duties of the City Commissioners and Wardens of the Port were assigned to one board consisting of three

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<sup>1</sup> Session of 1816, ch. 209.

<sup>2</sup> Lucas, *Picture of Baltimore*, 58.

<sup>3</sup> Session of 1817, ch. 168.



persons. At the same session another ordinance was passed by which three Commissioners of Health and one Consulting Physician were to be appointed annually to constitute a Board of Health.

The public school system of the city dates from this period. Early in 1826 the Assembly authorized the Mayor and City Council to establish such a system and to levy the taxes necessary for its support, provided they should approve of the act. They did so in the following year, and on March 8, 1828, an ordinance was adopted creating a Board of Commissioners of the Public Schools. The Board was elected annually at a joint session of the two Branches, and the Mayor was its president *ex officio*. The six Commissioners divided the city into six districts, established one school in each district, and made all necessary provisions for the government of the schools. They also appointed annually a Superintendent and fixed his compensation. No child above ten was admitted into the schools at first, and every child attending was charged one dollar per quarter, unless exempted by the Commissioners. The schools were supported by these fees, by the city's proportion of the state educational fund, and by direct appropriations made by the city. The system was soon in operation, though at first on a small scale. In 1831 the cost to the city of each student was three hundred and nineteen dollars, and the number of students was only 627 out of a population of over 80,000.<sup>1</sup> In 1834 the number of Commissioners of the Public Schools was increased to nine and in 1837 to thirteen. The number was afterwards made the same as that of the wards of the city, which was fourteen in 1842 and is twenty-two at the present time.

By an ordinance of 1826 the Mayor and the Presidents of the two Branches were constituted a Board of Commissioners of Finance. A sinking fund had been administered since 1818 by Commissioners appointed for that purpose, who now

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<sup>1</sup> Lucas, 216.

delivered the stock in their possession to the new Board. The latter was to administer the sinking fund for the payment of the interest and extinguishment of the principal of the public debt. By a supplement to this ordinance passed in 1833, a convention of both Branches elected two persons who, with the Mayor, constituted the Commissioners of Finance. But meanwhile, instead of being cancelled, the debt continued to grow quite rapidly. In 1826 it was only \$458,920.20, while in 1842 it was \$5,318,625.66. About \$4,830,000 of this had been contracted in prosecuting schemes of internal improvement, which were favored by the spirit of the times, and upon which not only the city but the state and the nation had embarked.

For we have reached a new era in the history of Baltimore, as well as of the nation. It is an era of rapid material development. The period just after the War of 1812 had been a dark one for the city. The celebrated "Baltimore Clippers" could no longer reap such rich returns from the European trade. And though a compensatory traffic had sprung up with South America, commerce was never again relatively so important as before the war. But new industrial methods were at hand. The era of manufacturing on a large scale was gradually ushered in. And with it came the period of canals, then of railways and rapid transportation. It was on July 4, 1828, that Charles Carroll, of Carrollton, the last surviving signer of the Declaration of Independence, laid "the cornerstone" of the Baltimore and Ohio Railroad. "One man's life formed the connecting link between the political revolution of the last century and the industrial revolution of the present."<sup>1</sup> For this was the first railroad in the United States. By May, 1832, there were seventy-one miles in operation. The Baltimore and Susquehanna Railroad, from Baltimore to York, Pennsylvania, was chartered in 1828 and begun in 1829. The city purchased stock in both of these roads and had repre-

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<sup>1</sup> Hadley's *Railroad Transportation*, p. 1.

sentatives on the board of directors of each of them. Public enthusiasm ran high.

This ardor to engage in public improvements was not a local phenomenon, but a characteristic of a new stage in the development of the country. Life pulsed more vigorously through the national arteries. The masses of the people had become self-conscious and self-assertive. The new industrial activity found its correlative in a new political activity, which infused a more strongly democratic spirit into the government than it had ever known before. The effect of this spirit was seen in Baltimore in the total abolition of the electoral system, so that the choice of Mayor was entrusted directly to the people.<sup>1</sup> We have seen how this system had been partly abolished in 1808. It was in 1833 that the work was completed. These two dates mark the periods when the two great tidal waves of democracy swept over the American nation. There is more than a coincidence, there is a relation of cause and effect between the administration of Thomas Jefferson and the law of 1808; and also between the second complete triumph of the more radical democracy that was incarnated in Andrew Jackson, and the abolition of Baltimore's electoral system in 1833.

For a number of years after the choice of Mayor was transferred to the people no laws of prime importance were passed.<sup>2</sup>

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<sup>1</sup> Acts of Session of 1832, ch. 206. Approved March 15, 1833.

<sup>2</sup> A summary of some of the chief ordinances of this period may prove instructive through its very tediousness. It will show the variability and the confusion of functions due to the lack of a true principle of administration. An ordinance of 1838 re-enacts a provision of a previous ordinance that there should be a Consulting Physician to the Board of Health. In 1839 this office was abolished. It was re-established in 1841. But in 1844 the offices of Consulting Physician and Commissioners of Health were abolished and their duties transferred respectively to the Health Officer and the City Commissioners. In 1845, however, there was again appointed a Board of Health, to consist of the Health Officer, a Commissioner of Health, and a City Physician. In 1849 a City Commissioner and two Assistant Commissioners were appointed to look after the streets, and after-

But in 1845 a statute was enacted in accordance with which the Governor appointed five commissioners to divide the city into twenty wards. It was provided that one member should be elected to the First Branch from each ward, and one member to the Second Branch "from every two wards contiguous to each other." The commissioners were authorized to specify which wards should be thus united in electing a member to the Second Branch. According to the act the election of members of the Second Branch was made annual; but this part was soon repealed so as to make their election biennial again (March 4, 1846).

Being empowered by an act of the Assembly, the city government passed an ordinance in 1854 for the purchase of the corporate rights of the Baltimore Water Company, and directed the Commissioners of Finance to issue certificates of debt for that purpose. Later in the year a Water Board was appointed, consisting of three members. The regular term of office was three years. They were charged with the preservation of the quantity and purity of the water, the management of all the property belonging to the works, etc. They were empowered to appoint certain officers to aid them in the discharge of their duties. In 1857 the Board was made to consist of six Commissioners, appointed biennially, and the Mayor, who acted as chairman. They had power to appoint a Water Engineer, a Water Registrar and other officers, and to make all needful rules and regulations. Changes in the details of their duties have been made by several ordinances since, but the main features of the organization of the Board remain unaltered to-day.

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wards they were also assigned the duties of Port Wardens. This expedient of dividing the functions of two offices among three functionaries was a favorite one, and was continued in 1861 by the appointment, in lieu of the City Commissioner and his two Assistants, of a Board of City Commissioners and Port Wardens, to consist of three persons. But in 1863 it was enacted that one City Commissioner and one Assistant be appointed annually. A few days later it was provided that one Port Warden should be appointed annually.



Fires in the city were extinguished by volunteer companies until 1858. The Mechanical Company, the oldest in Baltimore, had purchased an engine as early as 1769. In 1832 there were nine fire companies and seven hose companies, which were aided by the funds of the city to the amount of four thousand dollars a year. According to the annals of that period and the successive Mayors' messages of a later date, the companies were almost proverbial for their efficiency. Nevertheless it finally seemed advisable to substitute a paid Fire Department, which was done in 1858 by the appointment of five Fire Commissioners.<sup>1</sup> Their regular term was made five years (changed to four years in 1868.) They had power to appoint all the persons necessary to perform the duties of the department, except the Chief Engineer, who was nominated by the Mayor and confirmed by the two Branches.

Early in 1860 an important law was enacted by which the control of the police system was taken from the Mayor and City Council and transferred to a board appointed by the state government. The change was made on account of the disgraceful election riots which terrorized the city from 1856 to 1860, when the American or Know-Nothing party was in power. A vigorous protest was made by the City Council against the justice and constitutionality of the new law, and it was contested in the courts, but was sustained. The police system had developed from the old night watch and had been reconstructed in 1856. The new law repealed the sections in former laws giving the Mayor and Council powers to appoint, pay and arm the police. These powers were transferred to a Board of Police Commissioners consisting of the Mayor and four residents of Baltimore appointed by the General Assembly on joint ballot. Their term of office was four years. A majority of the Board constituted a quorum, and the refusal of the Mayor to act in no wise impaired the right or duty of the Commissioners. It was their duty to employ a police

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<sup>1</sup> Ordinance of Dec. 10, 1858.

force, preserve the public peace, and enforce the ordinances of the city. They were required to take an oath not to appoint or remove any policeman on account of his political opinions. Policemen were employed to serve for five years, and, if they performed their duties faithfully, were to be given the preference by the Commissioners in making their new appointments.

By another act passed in the same month (February, 1860) the Board of Police Commissioners was to divide each ward into election precincts and to appoint three Judges of Election for each precinct. These officers were given power to preserve the peace at voting places and to commit to jail all violators of any election law. We shall see that the duties imposed upon the Police Commissioners by this act were transferred to the Supervisors of Elections in 1876.

In 1862 it was enacted that two Commissioners, instead of four, should act with the Mayor to constitute the Board of Police Commissioners, and later the requirement that the Mayor should be a member of the Board was omitted. But the policy of appointing Baltimore's Police Commissioners at Annapolis, which was first introduced as an emergency measure, still remains a characteristic of the city government.

By a resolution and an ordinance of 1860 a Park Commission, consisting of five persons including the Mayor, had been authorized to purchase and take charge of some sites for public parks. In 1861 the Assembly enacted a statute confirming this action, and also authorized the Commissioners to make rules for the preservation of order in the parks, and gave them power to declare what fines, not to exceed one hundred dollars, should be imposed for breaches of the regulations. This law is still in force, though by an ordinance of 1888, the number of Commissioners, including the Mayor, is now seven.

The history of Baltimore during the Civil War contains several interesting episodes, but none which are of great importance for the student of municipal government. The political reorganization after the war was marked by the adoption in 1867 of the present Constitution of Maryland.

This is interesting from a municipal point of view, for the eleventh article is devoted entirely to the City of Baltimore. But this article does not give any such constitutional guarantee of home rule or freedom from legislative interference as might at first be supposed. For the last section provides that "the General Assembly may make such changes in this article, except in section seventh thereof, as it may deem best; and this article shall not be so construed or taken as to make the political corporation of Baltimore independent of or free from the control which the General Assembly of Maryland has over all such corporations in the state."

The seventh section, to which reference is thus made, provides that no debt shall be created or the credit of the city given to any individual or association, unless it first be authorized by the Assembly and by an ordinance of the city and a vote of the citizens. "But the Mayor and City Council may, temporarily, borrow any amount of money to meet any deficiency in the city treasury, or to provide for any emergency arising from the necessity of maintaining the Police, or preserving the safety and sanitary condition of the city."

Most of the other sections relate to the election, powers and duties of the Mayor and Council; but, with one exception, there was no noteworthy change made in these, nor has there been since. The exception consisted in a requirement that the term of the Mayor should be four years; but in 1870 the Assembly repealed this and made the term two years again.

In 1874 there was an act passed for the appointment of three persons to act as an Appeal Tax Court for the purpose of hearing appeals and correcting assessments of taxes.<sup>1</sup> Somewhat similar acts had been passed before, but the provisions of this one are still on the statute-book. They will be summarized further on.

The control over elections, which had been given to the Police Commissioners in 1860, was transferred in 1876 to

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<sup>1</sup>*Acts of Assembly*, 1874, ch. 483.

three Supervisors of Elections, appointed by the Governor and confirmed by the Senate.<sup>1</sup> This act, amended slightly as to the details, remains a part of the code to-day.

The same remark applies to nearly all the important laws passed during the most recent period. In order to avoid needless repetition, they will not be summarized here, but will be presented under the next division of the subject, entitled "The Present Government of Baltimore." The slow and conservative manner in which the present government has been evolved from the past is a characteristic of Baltimore's municipal history. During all the century of its development the government has never made a leap. It is one of the kind that "broadens slowly down from precedent to precedent." And so its organization in the immediate past differed but little from that of the present time. Before entering upon a description of its present organization, however, there are two further points to be noticed—the recent heavy loans for public improvements, and the addition to the city of the portion known as the "Annex."

The funded debt of the city, which was \$23,279,970.85 at the beginning of the year 1870, had grown to be \$33,531,798.06 by the beginning of 1880.<sup>2</sup> About one-fourth of this was due to the cost of the water supply and one-fourth to the loans made to the railroads. The rest had been mainly employed in purchasing parks, building a new City Hall, and making other improvements, as well as by repeatedly funding the floating debts. In 1888 the city was empowered to borrow five million dollars by an act which was a re-enactment with more detailed specifications of a statute which had been passed in 1882.<sup>3</sup> The loan was to be used for the purpose of constructing or improving sewers, streets, school-houses and bridges, the improvement of Patterson Park, the purchase of

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<sup>1</sup>*Acts of Assembly*, 1876, ch. 223.

<sup>2</sup>Registers' Reports as summarized in the Mayors' Messages of these dates.

<sup>3</sup>*Acts of Assembly*, 1882, ch. 406.



additional land for parks, and building an addition to the Court House and Record Office. A specific sum was appropriated for each of these purposes. The sum of three cents is annually levied on every hundred dollars' worth of assessable property, to be applied by the Commissioners of Finance to the establishment of a sinking fund for the redemption of the bonds, which mature in 1928.<sup>1</sup>

The six million dollar loan of 1892 was for the purpose of constructing or improving sewers, streets, school-houses, bridges, and conduits for underground wires, building a new Court House, and making a topographical survey of the city. The bonds are to be redeemed in 1940 from the proceeds of a tax of two cents on every hundred dollars' worth of property.<sup>2</sup>

The four million dollar loan of 1894 provided for the appropriation of one million dollars for the new Court House, two millions for an enlargement of the water supply and the laying of additional mains in the city, and one million for the purchase of Clifton or other parks. The price actually paid for Clifton, as fixed by the jury of condemnation, was \$710,000. The bonds for the total debt mature in 1945. A tax of one half of a cent on the hundred dollars is levied for the redemption of that portion of the bonds used for building the Court House. The Park Commission is required to pay each quarter to the Commissioners of Finance five per cent of the park tax received from the street railway companies, and the Commissioners of Finance employ this fund for the redemption of the bonds used in the purchase of parks. Those used for the enlargement of the water supply are provided for out of the moneys received by the Water Registrar.

All of these loans were approved by the people before being made, as is required by the State Constitution. The funded and guaranteed debt at the close of 1895 (Dec. 31) was \$32,437,818.43, and the floating debt \$1,385,503.79.

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<sup>1</sup> *Acts of Assembly*, 1888, ch. 131. Ordinance 98, approved Sept. 26, 1888.

<sup>2</sup> *Acts of Assembly*, 1892, ch. 138. Ordinance 100, approved Oct. 7, 1892.

The addition of the territory to the north of the city, formerly a part of Baltimore County, and now known as the "Annex," occurred in 1888. It was divided into two wards, the twenty-first and twenty-second. The act provided that the rate of taxation should not be increased in the annexed territory until the year 1900, but that, on the other hand, the city should expend within this territory all the revenue derived from it.<sup>1</sup>

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### III.

#### OUTLINE OF THE PRESENT GOVERNMENT OF BALTIMORE.

*The Mayor.*—The term of office of the Mayor is two years. He must be twenty-five years old, ten years a citizen of the United States, a resident of the city five years preceding the election, and with property in the city assessed to the amount of five hundred dollars. In case of a vacancy in the office the President of the First Branch of the City Council orders a new election, and meanwhile acts as Mayor. He also acts as Mayor when the latter is sick or absent.

The Mayor has the jurisdiction and powers of a Justice of the Peace, except as to the recovery of debts. He may call upon any officer of the city for a statement of accounts as often as he may think necessary. In the passage of ordinances a three-fourths vote of both Branches is required to override his veto; but an ordinance passed by the Council becomes a law if he fails to return it within five days. His salary is five thousand dollars.

*The City Council.*—The First Branch of the Council consists of one member from each of the twenty-two wards of the city. A member must be above twenty-one years of age, a

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<sup>1</sup>*Acts of Assembly*, 1888, ch. 98; Ordinance of June 27, 1888.

resident of the city three years preceding his election, a resident of the ward for which he is elected, and assessed to the amount of three hundred dollars. He holds his office one year.

The Second Branch consists of eleven members, each one being elected from two contiguous wards. A member must be twenty-five years old, a resident of the city four years previous to his election, and assessed to the amount of five hundred dollars. He must be a resident of the ward for which he is elected, and holds office two years.

The deliberations of the Council are public. Their regular session may not last more than one hundred and twenty days, though the Mayor can convene them in extra session. The Council has the right to pass ordinances regulating the manner of appointments to office; but in the absence of such ordinances the Mayor "by and with the advice and consent of a convention of the two Branches of the City Council," appoints all officers, except the Register and the clerks employed by the city. The Register is appointed by a convention of the two Branches, biennially, and is removable at pleasure in the same way. The clerks of the different departments are usually appointed by those departments. No person can at any time hold more than one office under the Mayor and City Council. No salaried officer can be concerned in any contract for work to be done for the city. Except when otherwise provided by law, all offices are held during the pleasure of the Mayor.

The powers of the Mayor and the present method of appointing to office will be discussed more fully in the concluding part of this monograph.

*The Comptroller* is appointed biennially in the same manner as other city officers, and receives a salary of three thousand dollars. The amount of his bond is ten thousand dollars. He audits and settles all accounts of the corporation when their settlement is not committed by ordinance to some other authority; he supervises the fiscal concerns of all the departments which receive or disburse the public moneys, examines all contracts made by the city officials and all requisitions

upon the city treasury, certifies the correctness of the pay-rolls of all the officers, and performs other similar duties. He appoints a Deputy Comptroller, a chief clerk and an assistant clerk.

*The Register* is appointed biennially, not by the Mayor, but by a convention of both Branches of the Council. The amount of his bond is fifty thousand dollars. He has charge of the corporate seal of the city, keeps all the money of the city deposited in four banks selected by the Mayor, Comptroller and Register, makes all payments in checks on these banks, countersigned by the Mayor, and lays before the Council an annual report of the receipts and expenditures of the past year and an estimate of those of the current year. His salary is three thousand and three hundred dollars. He appoints a Deputy to assist him in his work and to collect the rents of city property for the Commissioners of Finance. He also appoints four clerks.

*Board of Police Commissioners.*—The three members of this Board are elected by a joint meeting of the two houses of the General Assembly. They must have been residents of the city for the three years next preceding their election. Their term is six years, one of them retiring every two years; the salary is two thousand five hundred dollars. Each Commissioner gives bond to the amount of ten thousand dollars for the faithful discharge of his duties. They take an oath not to appoint or remove any policeman or other person employed by them on account of his political opinions or for any other cause than his fitness or unfitness for the position.

The chief duties of the Board are to preserve the public peace, protect the rights of persons and property, enforce the laws, and employ a permanent police force under such regulations as they may prescribe. This force consists at present of one marshal and one deputy marshal of police, and one captain, two lieutenants, two round sergeants, two turnkeys, and one clerk at each station-house, such a number of sergeants for each police district as the Board may deem necessary, and six



hundred and twenty men. This number may be increased at any time by the appointment of special policemen. The regular policemen are appointed for four years. The Sheriff of Baltimore City (who, like the sheriffs of the counties, is elected biennially by the people) acts under the control of the Board for the preservation of the public peace, and, if ordered, summons the *posse comitatus* for that purpose. The Board can also call out such military force in the city as they may see fit, to aid them in preventing disorder or suppressing insurrection.

It is the duty of the Board to estimate annually the sum of money necessary for the current year and certify the same to the Mayor and City Council, who are required to raise the amount by taxation. If the amount estimated proves insufficient, the Board is authorized to issue certificates of indebtedness in the name of the Mayor and City Council, bearing interest at six per cent., payable not more than twelve months after date, and receivable at par in payment of city taxes. The Board keeps a full record of its proceedings and financial transactions open to the inspection of the General Assembly and the Mayor and Register of the city. It makes a report to the General Assembly at each regular session.

Three other large American cities, St. Louis,<sup>1</sup> Boston<sup>2</sup> and Cincinnati,<sup>3</sup> have Boards of Police Commissioners appointed by the governor or legislature. Strenuous advocates of the principle of home rule for American cities object to the appointment of the local police by the state government. But the Maryland courts have held that the preservation of the peace is a function of the state and not of the locality.<sup>4</sup> Some other state courts have taken the opposite view.<sup>5</sup> Whatever

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<sup>1</sup> Conkling, *City Government in the U. S.*, 79.

<sup>2</sup> J. M. Bugbee, *J. H. U. Studies*, Fifth Series, 121.

<sup>3</sup> J. R. Commons, *City Government*, 13.

<sup>4</sup> *Baltimore vs. Board of Police*, 15 Md., 376.

<sup>5</sup> Goodnow, *Municipal Home Rule*, 88.

may be its theoretical justification or practical expediency, the plan presents two interesting anomalies. The first is that the Police Commissioners spend whatever amount of the city's money they deem necessary, without being responsible to the city itself for the manner in which it is spent. And in the second place the city is held responsible for the enforcement of its laws, though their enforcement is entrusted to a body of policemen over whom the city has no control.

It is quite likely that before long there will be a closer scrutiny of the relation of the state and city governments, especially in regard to the appointment of the Boards of Police Commissioners, Supervisors of Elections, and Liquor License Commissioners. The question has not been prominent hitherto because both the state and municipal governments have been dominated by a single political party for the last twenty-eight years. But recent events render it probable that at times one party may be in power in Baltimore and another in Annapolis; and this, in connection with the fact that Baltimore's representation in the Assembly is so grossly inequitable (with nearly half the population of the state its representatives form about one fifth of the House of Delegates and less than one eighth of the Senate) will render the development of dissatisfaction a probability of the near future.

*The Board of Supervisors of Elections.*—The Governor, by and with the advice and consent of the Senate, biennially appoints the three members of this Board. The salary of each is eighteen hundred dollars a year. They must be voters in the city, and two of them must belong to the two leading political parties of the state. It is the duty of the Board to appoint, not later than the first day of August of each year, three Officers of Registration for each of the nine precincts of the twenty-two wards of the city. Two of them are always selected from the two leading parties; they must be legal voters in the precincts for which they are appointed; and they cannot be holders of office, or candidates for office at the next election. It is required that their names be published in the

newspapers in advance, so that those against whom just complaint is made may be removed and others appointed in their place.

Another duty of the Board of Supervisors of Elections is to appoint three Judges of Election for each precinct of the city. Their qualifications and manner of appointment are much the same as those of the Officers of Registration. Every person appointed Judge of Election in the manner prescribed by the statute is liable to fine or imprisonment on refusal to serve. The Judges have power to preserve peace and to commit to jail the violator of any election law.

*The Board of Liquor License Commissioners* consists of three persons appointed biennially by the Governor and confirmed by the Senate, not more than two of them belonging to the same party. Their salaries and other expenses are paid by the city. Petitions for licenses to sell intoxicating liquors at certain places are published by them not less than fifteen days before time to take action, in order that residents in the vicinity may have opportunity to present reasons for or against granting the license. Those to whom licenses are granted are forbidden to sell intoxicants on Sunday or to minors, drunkards, or any person of intemperate habits whose parent, wife, or child shall give notice in writing to the licensee that such is the case, and verify it by affidavit. The city receives three-fourths of the revenue that comes from granting licenses. The city's share in 1895 was \$405,891.95.

*The Board of Commissioners of Public Schools* has power to employ and remove teachers, prescribe their qualifications, and fix their salaries, subject to the approval of the Mayor and City Council. They determine the courses of study and the text-books to be used, and make the rules and regulations necessary for the management of the schools. There are twenty-two Commissioners, one from each ward, appointed by a convention of the two Branches of the City Council. They serve without pay. The Mayor is a member *ex officio*. If any Commissioner removes from the ward in which he

resided at the time of his appointment, his place is declared vacant. The Board may also declare vacant the place of any Commissioner who shall absent himself from three successive stated meetings of the Board without showing satisfactory cause. The term of office is four years, one-fourth of the Commissioners retiring every year. The Board elects its own President and Secretary.

The Superintendent of Public Instruction is appointed by the Commissioners and serves four years. It is his duty to visit every school as often as once in each quarterly session, to inquire into all matters relating to discipline, studies, and the condition of the school-houses, and to make monthly reports to the Board and an annual report to the Mayor and Council. His salary is fixed by the Board, subject to the approval of the Council. He is aided in his work by an Assistant Superintendent.

No charges are made in the schools for tuition or for the use of books and stationery. The Orphans' Court of the city pays all "funds arising from intestates' estates that may be administered upon in said Court" to the Commissioners of Public Schools. All taxes paid by colored persons for educational purposes are devoted to the use of the schools for colored children. This is in accordance with a law of the State (1872, ch. 377).

The present excessive number of School Commissioners has resulted from following the precedent set in 1842, when the number of the Commissioners was made the same as the number of wards then existing. The present size of the Board is certainly unjustifiable on any scientific principle of administration. The merits of the commission system in general will be discussed more fully later on. But even if it be granted that plural-headed executives are more efficient in administration, it is undesirable to have a small-sized legislature to constitute a School Board. The present Board is as large as the First Branch and twice as large as the Second Branch of the City Council which appoints them. This is



carrying the polycephalous principle to an extreme. It minimizes the public prominence and the official responsibility of each member. If such a system can be worked with marked efficiency, the cause of the efficiency must be sought for elsewhere than in the system. There is a growing desire for its reorganization. The number of Commissioners should be greatly reduced, and they should be appointed by the Mayor. Furthermore, such a system of selection and promotion of teachers according to merit, and merit only, should be introduced as would render futile those charges of political influence and personal favoritism which, whether just or unjust, have been made in the past.

*Commissioners for Opening Streets.*—There are three of these, appointed biennially in the same manner as other city officers. When directed by an ordinance, of which previous notice has been given, to open, widen, straighten, or close up any street or alley, they estimate the benefits and damages to the owners of the adjacent property, as well as the expenses incurred. They assess the land and improvements of such owners as are benefited, and, should the direct benefits not be equal to the damages and expenses incurred, the balance is paid by the City Register, and provided for in the general levy. Any one dissatisfied with the assessment of damages or benefits may appeal to the Baltimore City Court and have the question decided by a jury trial.

The Commissioners for Opening Streets and the City Commissioner are appointed a Board to construct, open, enlarge, and straighten sewers in the city. Their method of procedure is similar to that which has just been described in the case of streets.

*City Commissioner and Assistants.*—This department includes the leveling, grading, making, and repairing the streets and bridges, and contracting for materials for these purposes after the contracts have been approved by the Mayor, Register, and Comptroller. It is also the duty of the City Commissioner to ascertain the lines of any of the streets or alleys or

the boundary of any of the lots. An ordinance approved May 17, 1895, provides that there shall be three Assistant City Commissioners in addition to the head of the department. Their term was to begin June 1, 1895, and continue till March 1, 1896, and thereafter they are all to be appointed biennially. There had been dissatisfaction with the work of the department, and the new law changed its *personnel* and raised the salary of its officers, but did not alter its organization.

*The Commissioner of Street Cleaning* has charge of cleaning the streets and the removal of ashes and garbage. It is required that one cart and driver shall pass through each street and alley for the removal of ashes and garbage on alternate days, three times a week, from the first of November to the first of May, and daily (Sundays excepted) from the first of May to the first of November. The Commissioner is required to divide the city into seven districts; and seven Superintendents of Street Cleaning are appointed by the Mayor and confirmed by the Council, one from each district, to act under the direction of the Commissioner of Street Cleaning and to employ an effective force for keeping the streets in a cleanly condition.

*Appeal Tax Court.*—The Mayor and City Council appoint the three Judges of the Appeal Tax Court. The Court gives notice two weeks previous to the First Monday in March that it is ready to receive correct lists of all property liable to taxation. After the first Monday in June the assessors value and assess the property of such persons as have failed to return the lists. On or before the first Monday in December those who feel themselves aggrieved by the valuation may appeal to the Court. The Court may, when it deems advisable, make alterations in the amount of taxation, without an appeal. The Court has the power, on application, to abate the taxes on manufacturing plant, except machinery used for printing periodical publications or for generating gas or electricity.

*The City Collector* is appointed biennially and collects the taxes levied by the city and state. He has the power to

appoint a deputy-collector, cashier, assistant cashier, two book-keepers, fifteen clerks and twenty-eight bailiffs.

*The Water Board* consists of six Commissioners appointed biennially, together with the Mayor, who acts as president. They have power to pass rules and make provisions for the protection and preservation of the water-works. They appoint a Water Registrar, a Water Engineer, a Civil Engineer (these last two positions may be united at the discretion of the Board), and such clerks, gate-keepers, watchmen, etc. as may be necessary. These appointees perform such duties and receive such compensation as may be designated by the Board, and are subject to dismissal at its pleasure.

*The Board of Fire Commissioners* consists of three citizens appointed biennially, and the Mayor, who is a member *ex officio*. The Fire Department consists, in addition to the Board and their clerk, of a Chief Engineer, two Assistant Engineers, one Superintendent of Machinery, and the engine companies and hook and ladder companies. The Board appoints all the employees of the department for a term of four years. The law provides that the employees are subject to removal for good cause, but not on account of their political or religious sentiments.

*The Harbor Board.*—Six Commissioners are appointed to constitute, with the Mayor, the Harbor Board. The Mayor acts as president. Their chief business is to apply certain auction duties to improving the channel of the Chesapeake Bay and Patapsco River below Fort McHenry, and the harbor of the city. They also superintend the building and repairing of wharves. They appoint and fix the salaries of a civil engineer and supervisors of the work of the dredges and the removal of sediment.

Six Harbor Masters are also appointed in the same manner as other city officers, to make collections due for dockage and wharfage, of which they receive twenty per cent for their services.

*The Board of Health.*—There are appointed biennially a physician as Commissioner of Health and Register of Vital Statistics, and an Assistant Commissioner of Health, who, together with the Mayor, constitute a Board of Health. “No appointments to clerical or other positions in the Health Department shall be made without the written consent of the Mayor, nor shall the salary of any officer or appointee in said department be fixed or changed without the consent of the Mayor.”

It is the duty of the Commissioner of Health to enforce all ordinances for the preservation of the health of the city. He is required to make a circuit of observation once every week to every part of the city which may be deemed the cause of disease and take the necessary measures to correct the evil, and to arrest the progress of contagious and infectious diseases.

The Board of Health appoints a Medical Examiner and an Assistant. Whenever called upon by the Coroners or the Board of Health, they make post-mortem examinations and such other medico-legal inquiries as may furnish the evidence required in any case. Twenty-two vaccine physicians are appointed from the different wards by the Mayor and Council.

*The Board of Commissioners of Finance* is made up of the Mayor and two other persons appointed biennially in the same manner as other city officers. The Mayor supplies vacancies caused by death or resignation until a meeting of the Council. “All the real estate from which income is derived, and all the stocks, bonds, and obligations of any improvement company now held or claimed as the property of the corporation, or as due to it, as well as all taxes which may hereafter be levied and collected for this purpose, are appropriated and set apart, to be held by the Commissioners of Finance exclusively for the payment as aforesaid of the public debt of the corporation, and the interest thereupon as the same, or any part thereof, may become due and payable.”<sup>1</sup>

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<sup>1</sup> City Code of 1893, 930.



The Commissioners are required to make an annual report of their accounts to the City Council. The Deputy Register keeps the books, accounts and records of the office, and performs such other duties as are required.

A statement of the recent growth of the city debt and its amount at the close of the year 1895 have been given on a previous page.

*The Park Commission* consists of six members in addition to the Mayor, who is chairman. The other six members are appointed biennially and hold office as long as in the judgment of the Mayor they properly discharge their duties. They have general charge of business connected with the parks, and can make regulations for the preservation of order within them, and declare what fines, not exceeding one hundred dollars in any one case, shall be imposed for breaches of the regulations. Such fines are appropriated for the purposes of the park.

The park tax, as it is called, consists of nine per cent. of the gross receipts of the street railway companies. In 1895 it amounted to \$234,167. No part of the financial legislation of the city has been more commendable than the levying of this tax in return for granting the street railway franchises.

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#### IV.

#### CONCLUSION.

There are two factors in a government of the highest efficiency—the quality of the administrative and legislative machinery, and the spirit in which that machinery is operated. The most flawless governmental mechanism is no guarantee of good government unless the motives of the administrators are good. On the other hand complicated and cumbersome methods of procedure fail to give highly satisfactory results,

no matter in what spirit they are used. To secure the best results the people must entrust the operation of the right kind of machinery to the right kind of men. This essay is a study of the first of these factors. The description of the municipal organization which has just been given reveals many praiseworthy features; but there are three important changes in present methods which are imperatively demanded in order to secure the highest administrative efficiency.

*The Commission System.*—It has been asserted that the commission system, or government by municipal boards, was devised by professional politicians in order to increase the amount of patronage at their disposal. Though this may be the practical effect of the system, it was not historically the cause of its adoption. We have seen that in Baltimore it is as old as the town itself. It was quite a common form of government in the the early history of towns, and its continuance after they have become cities is very natural.

The commission system is supported, therefore, by the sanction of antiquity, and it is likely to continue to exist for some time in the future for no more logical reason than that it has already existed for a long time in the past. It is contrary to correct principles of administration as well as good rules of business management. Business men could not succeed if their affairs were entrusted to committees. The reason is obvious. If power is divided among five executive agents, personal responsibility is also divided. There may be wrongdoing, but each wrong-doer can lay the blame on his associates and rejoice that "there is safety in numbers." The investigator who wishes to locate any particular piece of blameworthiness when government is carried on by a complicated system of commissions will wander through devious mazes of administrative irresponsibility, and wander in vain. There is some justice in the assertion that we have more administrative awkwardness than any other nation. No people are more sagacious in business than Americans, but for various reasons they have never made a thorough application of their business

sagacity to municipal government. The true principle consists in uniting in one person the power of right administration and the responsibility for right administration, and promptly removing him if he fails to give satisfaction. He should have control over his department and be held to a strict account for the results.

But it may be urged that the single-headed department has been tried in Baltimore and has in some cases resulted badly. This proves that the department had the wrong man at its head, not that it needed many heads. No department will work well in the hands of an incompetent man, nor a board of incompetent men. No administrative plan will guarantee efficiency regardless of the character of the administrator. But the system of single-headed departments does guarantee the power to locate responsibility for inefficiency and to take prompt remedial action ; and this is not true of the polycephalous method of administration.

There is a strong tendency in American cities to rid themselves of the antiquated regime of commissions. The testimony of men like ex-Mayors Seth Low of Brooklyn, Curtis of Boston, and Latrobe of Baltimore is in favor of the less expensive and more effective method. "The many years' experience I have had in the city government," says the last named of the three, "has demonstrated one fact more clearly than any other, and that is that where the responsibility for any work is concentrated in the hands of a competent man, the work is done better and in a more satisfactory manner than where the responsibility is divided among several heads or is under the control of a board, no matter how able the members of the board may be. . . . Concentrate the responsibility in the heads of the departments, hold those heads to a strict accountability for what they should do, and give them the power to do their work and choose their subordinates without interference, and there will be no trouble in carrying on municipal works as well and as economically as other corporate works and enterprises are carried on."

The thorough application of this business principle to Baltimore's city government cannot be said to have failed, for it has never been tried.

*The Appointment of the Chief Officers.*—City Councils were originally entrusted with broad governmental powers. But more recently the development of distrust has caused a reaction which tends to reduce their powers to a minimum. Their members are often regarded as the misrepresentatives of the people whose function has been the administration of injustice. Some extremists have even proposed to abolish the Council altogether. "It is to-day," says Moorfield Storey, "a useless and therefore a mischievous body. The whole work which properly falls upon a City Council can be done by a single board."<sup>1</sup> The mistaken idea back of this proposal is that the city is a purely business corporation whose affairs can best be managed by a small board of directors. But it is in reality a political corporation as well, with powers and duties above those which belong to any mere business association. It should care for the varied interests of its thousands of inhabitants, and the only way in which this can properly be done is by the election of suitable representatives to frame laws which shall voice the will of the people. The existence of the Council as one of the co-ordinate branches of the city government, entrusted with full legislative powers under the charter, is easily justified.

But the attempt to have the legislature participate in the executive function of the appointment of officers has worked nothing but mischief. It is the duty of the legislature to make the laws and the duty of the executive to carry them into effect. But if the Mayor is to enforce the laws he must have the power to select the necessary agents. If this power is given him, he can be held accountable for the quality of the administration. But if he must divide this power with thirty-

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<sup>1</sup> *The Municipal Government of Boston*, National Conference for Good City Government, 1894, p. 68.



three other men, all accountability is so dissipated as to be practically lost. The Mayor and Council can each blame the other for poor appointments. If a Councilman, backed by "senatorial courtesy," prevents the confirmation of a good nominee or secures the confirmation of an inferior one, the people will never learn enough about it to hold the individual Councilman responsible. The general public cannot follow the actions of several dozen members of the Council. The consequence is that, instead of the Mayor dictating the appointments and assuming the responsibility, the members of the Council have practically the power of irresponsible dictation, with a strong temptation to use that power in the distribution of patronage. The quality of the official *personnel* is inevitably lowered, and the blame can be ascribed to nobody in particular. The system legalizes irresponsibility and calls it "a division of powers."

The better plan is to give the Mayor the right to appoint the chief officers. But this has been criticized as monarchical and as tending to result in tyranny. A little examination will dispel the illusion. The dread is an inherited one. The fear of official despotism was once well founded, and it has continued to haunt the American people long after the real danger has passed away. The ominous shadow of the third George has been cast across our whole political history. That monarch's course was a real menace to both English and American freedom, because he was not content with the duties of executive, but usurped the legislative functions as well, and because he was not responsible to the people, not being chosen by them, and holding his tenure for life. The strongest Mayor of an American city can obtain no such prerogatives. He is not the ruler of the city: he is only its most prominent employee—the one who is most carefully selected and most closely watched. He is the agent of his principal, the people; and to entrust him with adequate powers to carry into effect the will of the people is not undemocratic. For

the essence of democracy is that the will of the people should be made law and that the law should be made effective.

The people in their collective capacity, however, cannot exercise these powers. They must be delegated for brief periods to the legislature and the executive. Now executive power and accountability may be concentrated upon the executive himself, or may be scattered among the members of the legislature for the purpose of "putting a check on the executive." The result of this policy is to prevent the Mayor from accomplishing good as well as from doing harm. He cannot as a rule select the best officers if he would. And when selected they realize that they owe the office less to him than to the Council, and his power of discipline and control over his subordinates is thus impaired. Whoever expects first-class government under such circumstances must believe that the absence of executive power is the criterion of administrative excellence. It is necessary that adequate power should be lodged with a responsible agent. The dread of despotism is no excuse for the enthronement of inefficiency.

If the Mayor be given the power of removal as well as of appointment, his accountability for a good administration is complete. There has been a rapid development of sentiment in favor of clothing the Mayors of our cities with these powers. This is the correct administrative principle. But it is not a political panacea. It cannot give the people an excellent administration if they are unwilling to elect a capable administrator. If, however, they earnestly desire an efficient execution of the laws they can obtain it by this method, while they cannot always do so under complicated systems where power is divided among so many agents that a premium is put on irresponsibility.

*The Subordinate Civil Service.*—The most pernicious fallacy that ever dominated American politics has crept in under the deceitful guise of democracy. It is a false democratic doctrine that the government should give each man in turn a chance to draw a public salary for no better reason than his vigorous

display of partisanship on the winning side at the last election. The offices of the government are established for the service of the whole people, and the salaries are paid with money collected from the whole people; but too often the chief criterion of capacity to fill an office has been the amount of devotion exhibited in behalf of only one party or even of one chieftain of a party. True democracy gives every man who wants to serve the public an equal opportunity to compete with every other man on the basis of merit. The spoils system is undemocratic, because it teaches each officer that his tenure of office depends less on his fidelity as a servant of the people than on his loyalty to the interests of the patron that dictated his appointment. It is undemocratic, moreover, because it forms the basis of the most genuine despotism the American people have ever known—that of the irresponsible municipal dictators who, without the sanction of legal authority, have gained control of the appointment of officers and have mismanaged the affairs of our great cities. The real interests of the people demand that their public servants should be appointed for merit and merit only. Their interests likewise forbid the removal of trained officials to make room for unskilled appointees merely because the latter have different views on the tariff. No business man would tolerate rotation in office as applied to his own establishment; and a municipal corporation has just as much right to demand that its business affairs should be conducted on business principles.

Without elaborating the details of a system of civil service, it may be said that the responsible chiefs of departments should be appointed by the Mayor and stand to him in the relation of a cabinet. The officers of the subordinate civil service should be appointed in such a way as to render political influence or personal favoritism impossible. The clerical force of the various departments should be selected by competitive examinations somewhat like those of the United States government. They need not be literary except in so far as to include the rudiments of a good education; they could include

in addition tests of the knowledge the applicants may have of the special duties of the department in which they wish to work. Unskilled laborers should be selected by a bureau of registration of laborers, according to a system like that employed in Boston. Record should be made of their age and physical condition, and of testimony as to their character and previous experience, but not of their political or religious affiliations. Those who came up to the necessary requirements could then be chosen in the order of their application. A similar method applies to skilled laborers, except in special cases where competitive tests would be preferable. A good system is of course better than a poor one, but any system is preferable to allowing the offices to be used to reward men for their partisan services. As Bryce expresses it: "Appoint them by competition, however absurd competition may sometimes appear, choose them by lot, choose them anyhow; only do not let offices be tenable at the pleasure of party chiefs and lie in the uncontrolled patronage of persons who can use them to strengthen their own political position."

The abolition of the commission system, of the power of the Council to confirm appointments, and of the spoils system would greatly improve the quality of Baltimore's governmental machinery. But that alone is not sufficient. The people must see that this machinery is directed towards praiseworthy ends by trustworthy officials. These administrative devices would secure the power of locating responsibility for an inefficient execution of the laws. But they would not secure the election of a first-class executive. Their adoption does not necessarily mean a good administration. It merely means that if the people have a poor administration it is their own fault. It means that they can obtain as good a government as they deserve. No mechanical devices can form a substitute for an earnest interest in municipal affairs. The adoption of common sense business methods means much; but it will not be sufficient unless supplemented by a civic patriotism that is both vigilant and perennial.





III

COLONIAL ORIGINS

OF

NEW ENGLAND SENATES



JOHNS HOPKINS UNIVERSITY STUDIES  
IN  
HISTORICAL AND POLITICAL SCIENCE

HERBERT B. ADAMS, Editor

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History is past Politics and Politics are present History—*Freeman*

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FOURTEENTH SERIES

III

COLONIAL ORIGINS

OF

NEW ENGLAND SENATES

By F. L. RILEY, A. M.

*Fellow in History, J. H. U.*

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# CONTENTS.

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	PAGE.
INTRODUCTION.....	7
<b>CHAPTER I.—MASSACHUSETTS.</b>	
Section I.—Governmental Beginnings.....	9
Section II.—The Executive Function.....	11
Section III.—The Judicial Function.....	16
Section IV.—The Legislative Function.....	18
Section V.—The Proposed Constitution of 1778.....	23
Section VI.—The Constitution of 1780.....	25
<b>CHAPTER II.—CONNECTICUT.</b>	
Section I.—Governmental Beginnings.....	28
Section II.—The Executive Function.....	31
Section III.—The Judicial Function.....	33
Section IV.—The Legislative Function.....	36
Section V.—The Constitution of 1818.....	38
<b>CHAPTER III.—NEW HAMPSHIRE.</b>	
Section I.—Governmental Beginnings.....	40
Section II.—The Executive Function.....	41
Section III.—The Judicial Function.....	43
Section IV.—The Legislative Function.....	46
Section V.—The Constitution of 1776.....	48
Section VI.—The Proposed Constitution of 1779.....	51
Section VII.—The Proposed Constitution of 1781.....	51
Section VIII.—The Constitution of 1783-4.....	52
<b>CHAPTER IV.—RHODE ISLAND.</b>	
Section I.—Governmental Beginnings.....	54
Section II.—The Executive Function.....	59
Section III.—The Judicial Function.....	60
Section IV.—The Legislative Function.....	64
Section V.—The Constitution of 1842.....	66

## CHAPTER V.—CONCLUSIONS.

PAGE.

Section I.—Origin of the New England Senates..... 69

Section II.—Forces Which Gave Direction to their Development.

1. Limitation of the Number of Counsellors..... 72

2. Extent of Authority and Growth of the Colonies..... 72

3. Illogical Principle upon which Power was Distributed..... 73

4. Introduction of the Idea of a Complete Separation of the

Functions of Government..... 74

5. Inter-Colonial Influences..... 74

6. English Charters and Precedents..... 74

Section III.—Inherited Characteristics of the Senates.

1. Size..... 76

2. Personnel..... 76

3. Basis of Selection..... 76

4. Term of Office..... 76

## INTRODUCTION.

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The American Senates, like all other great institutions, are not the products of invention but of growth ; a growth, too, which required more than a century to mature. They appear in our early State Constitutions as the results of a series of evolutions which are synchronous with our colonial history. This research is designed to trace ultimately<sup>1</sup> the successive steps of this development from its inception in colonial institutions to its final results as embodied in our State and Federal Constitutions. It is undertaken with the desire of determining, as far as practicable, the different forces which have given direction to this growth and the relative effect of native and foreign influences in the formation of the finished product. Since the greater part of this study is confined to a period antedating the separation of governmental functions, it necessitates a more or less comprehensive treatment of all the departments of colonial government. The Colonial Councils, from which the State Senates evolved, originally exercised a power which was three-fold,—executive, judicial and legislative. In the course of time, however, they lost their executive and judicial authority, as is shown in the following pages, and were thus merged into State Senates in the present sense of the word.

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<sup>1</sup>The present study, however, is confined to the New England colonies, a continuation of the work being reserved for a future publication.





# COLONIAL ORIGINS OF NEW ENGLAND SENATES.

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## CHAPTER I.

### MASSACHUSETTS.

#### *Section I.—Governmental Beginnings.*

Historians and jurists of rare ability have subjected the first charter of the Massachusetts Bay Colony to the most searching analyses in order to determine the nature and extent of the power which it conferred upon the patentees. The conclusions which have been reached on this point are by no means harmonious. Some maintain that the charter conferred no powers apart from those exercised by ordinary trading corporations, and that it was therefore totally inadequate for the establishment of a commonwealth in a foreign land ;<sup>1</sup> while others, no

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<sup>1</sup> Lodge's *Short History of English Colonies in America*, 412 ; Oliver's *Puritan Commonwealth*, 52, 76 ; *Massachusetts Historical Soc. Proceedings*, 1869, 166-188. An excellent account of the limitations of this instrument is also given in Brooks Adams' *Emancipation of Mass.*, Ch. I. "Some of the best politicians and lawyers, after the Revolution, Somers, Holt, Treby and Ward noted the following defects in this charter : That being originally granted to a great company resident in England, it was wholly inapplicable to the circumstances of a distant colony, because it gave the body politic no more jurisdiction than every other corporation within the Kingdom ; that no authority was conferred to call special assemblies, wherein should appear the delegates of the people, because representation was expressly excluded

less eminent, contend that the colonists in erecting a civil government upon this basis neither violated the laws of England nor transgressed the limits of their prerogatives as defined in the charter.<sup>1</sup> However this may be, the transfer of the charter to the colony in 1630 affected the political status of the Assistants, or Counsellors very materially, since in the inevitable confusion arising out of this shifting of the seat of government, they were able to exchange the vaguely defined powers of the charter for a more substantial authority based upon the political necessities of the colony. Hence their power developed with astonishing rapidity.<sup>2</sup> From "directors of a

by the clause requiring the presence of the freemen in the General Courts; that no permission was given to raise money either on the colonists or on strangers trading thither, because the King could not give an authority which he did not himself possess; that it did not enable the legislative body to erect various judicatories, either of admiralty, or probate of wills, or of chancery, because that required such a special grant as did not here exist." (Neal's *History of New England*, ed. 1741, II, 105-6; Chalmer's *Political Annals*, I, 141-142).

<sup>1</sup> Prof. Joel Parker, the successor of Judge Story in the Cambridge Law School maintains the following theses which he supports by a series of cogent arguments: (1) That "the charter was not intended to be an act for the incorporation of a trading or merchants' company merely. But it was a grant which contemplated the settlement of a colony, with power in the corporated company to govern that colony"; (2) "The charter authorized the establishment of the government of the colony within the limits of the territory to be governed as was done by vote to transfer the charter and government"; (3) "The charter gave ample power of legislation and of government for the plantation or colony, including power to legislate on religious subjects in the manner in which the grantees and their associates claimed and exercised the legislative power"; (4) "The charter authorized the creation and erection of courts of judicature to hear and determine causes and to render final judgments and cause execution to be done without any appeal to the courts of England." (*Mass. and Its Early History*, Lowell Institute Lectures, 1869, 357-439). For further arguments pro and con on this subject see Ellis' *Puritan Age in Mass.*, Ch. VII; Adams' *Emancipation of Mass.*, Ch. I.

<sup>2</sup> Within a few months three important acts were passed which gave the Assistants powers that transcended the limits defined by the charter. 1. At the first General Court held at Boston in October, 1630, the freemen,

company," with a limited term of office as contemplated by the charter,<sup>1</sup> they soon rose to the dignity of magistrates<sup>2</sup> with practically a life-tenure of office. Another short step made them virtual "rulers of a commonwealth" with all the departments of government under their control.<sup>3</sup>

### *Section II.—The Executive Function.*

In the exercise of executive power, however, they acted more in accordance with the provisions of the charter than

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through the influence of the newly arrived Governor and Assistants (Hutchinson's *Hist. of Mass.*, I, 30), who had been chosen in England (*Ib.*, 20), delegated to the Assistants the privilege of choosing from among themselves "a Goūnr & Deputy Goūnr, whoe w<sup>th</sup> the Assistants should haue the power of makeing lawes & chuseing officers to execute the same;" and retained for themselves only the power of choosing Assistants "when they are to be chosen." (*Mass. Col. Rec.*, I, 79.) Of course the practical result of this last clause was a life-tenure for the Assistants. (Hutchinson, I, 30; Palfrey's *Compendious Hist. of New Eng.*, I, 123; Winthrop's *Hist. of New Eng.*, I, 85; Hubbard's *Hist. of New Eng.*, 147). 2. Six months later it was voted that these extraordinary powers which had been granted the Assistants might be exercised by five or even a less number (*Mass. Col. Rec.*, I, 84), though the charter required at least six Assistants and either the Governor or Deputy Governor to constitute a quorum (*Ib.*, 11). 3. Two months later (May 18, 1631), it was enacted that for the future "it shalbe lawfull for the Comōns to ppounde any pson or psons whome they shall desire to be chosen Assistants, & if it be doubtfull whith<sup>r</sup> it be the great<sup>r</sup> pte of the comons or not, it shalbe putt to the poll. The like course to be holden when they, the said comōns, shall see cause for any defect or misbehav<sup>r</sup> to remoue any one or more of y<sup>e</sup> Assist<sup>ts</sup>." (*Mass. Col. Rec.*, I, 87.) The obscurely-worded sentence which seems to have been appended as "a rider" at the end of an act that would have been otherwise very liberal, created a precedent for a permanent tenure of the magistracy, "since it required the invidious and difficult process of a vote for the confirmation or removal of Assistants already in office" (Palfrey, I, 123; Winthrop, I, 85). Hence "the dignities, the emoluments and for a considerable time, the powers of the government were monopolized by ten or twelve persons." (*Puritan Com.*, 55; Hutchinson, I, 293, note).

<sup>1</sup> *Mass. Col. Rec.*, I, 10, 12.

<sup>2</sup> Grahame's *Col. Hist. of U. S.*, I, 162; *Puritan Com.*, 55, 56.

<sup>3</sup> See Prof. G. H. Haynes' *Representation and Suffrage in Mass.*, 1620-1691, J. H. U. Studies, Twelfth Series, VIII-IX, Ch. 2.



when assuming the other functions of government. It is probably due to this cause that they were enabled to keep strictly intact, throughout the colonial period, this alone of all their original powers.

The first charter vested the executive function in the Governor, Deputy Governor and eighteen<sup>1</sup> Assistants or Counselors.<sup>2</sup> Their general duties pertained to the transactions of "matters in the absence of the General Court."<sup>3</sup> Further details as to time and place of meeting, as well as the specific nature and scope of their duties, were to be determined as the exigencies of the colony might demand. Randolph, writing about 1676, says that the Council met in its executive capacity twice every week, and as often besides as it was convened by the Governor.<sup>4</sup>

<sup>1</sup> This number was not chosen, however, at any one time in the first fifty years after the transfer of the charter to the colony in 1630. (Palfrey, II, 233). During the earlier years from six to nine were generally chosen, vacancies being left for men of note who might come over. (Palfrey, I, 149; Hutchinson, I, 44-5). In 1658 the number was limited by law to fourteen. (*Mass. Col. Rec.*, IV, 1 pt. 1, 347). This law was repealed in 1641, yet the practice remained the same. (*Ib.*, 347; pt. 2, 32; 468, Palfrey, II, 28). On the next year Charles II demanded that not more than eighteen nor less than ten Assistants be chosen annually. (*Mass. Col. Rec.*, IV, pt. 2, 32; Perry's *Hist. Papers of the Amer. Col. Church*, 35). A special election was held in October 16, 1678, to bring the number up to eighteen in compliance with a demand of the home government. (*Mass. Col. Rec.*, V, 195). July 24, 1679, the King demanded "that the ancient number of Assistants be henceforth observed as by charter." (Hutchinson, I, 293; Chalmers, I, 451). This was observed until 1686 (*Mass. Col. Rec.*, V, 513), when the government passed into the control of a President and Council appointed by the Crown. (*Conn. Col. Rec.*, III, 207, note).

<sup>2</sup> Savage (Winthrop, II, 207, note) observes that without the Assistants "the Governor would have been nothing and with them his power seems to have been hardly more than that of *primus inter pares*." He presided over the sittings of the Council and was entitled to one vote at all times, and two when there was a tie. (*Ibid*; Hutchinson, II, 15; Palfrey, III, 71-2, 74; Barry's *Hist. of Mass.*, II, 16, 17).

<sup>3</sup> *Mass. Col. Rec.*, I, 10; Chalmers, 137, 436.

<sup>4</sup> Randolph's *Present State of New England*, published in Perry's *Historical Papers of the American Colonial Church*, 2-3; Washburn's *Judicial History of Massachusetts*, 23.

Yet the exercise of this authority, as broadly outlined in the charter,<sup>1</sup> did not go unchallenged. Before the details of the Council's power could become crystallized into precedents which could be cited as historical grounds for its activity, it encountered the opposition of the Deputies. The latter attempted first to gain admittance to the executive Council, but failing in this, they tried to make it strictly dependent upon the General Court.<sup>2</sup> This acrimonious contest was finally settled by referring the matter to the elders—the sacred oracles of the colony—who, as usual, declared in favor of the patri-cians. Hence the composition and powers of the Executive Council remained *in statu quo*. The Deputies, frustrated in their first attempt to share the executive function with the Council, then resorted to various schemes, by which they still hoped to diminish its powers.<sup>3</sup>

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<sup>1</sup>Chalmers' *Political Annals*, 137; *Mass. Col. Rec.*, I, 10.

<sup>2</sup>The first conflict arose in 1643, when the General Court committed the affairs of the colony during its recess to the Magistrates and the Deputies of Boston, Charlestown, Cambridge, Roxbury and Dorchester. (*Mass. Col. Rec.*, II, 46). This addition of Deputies to the Executive Council was opposed by the Magistrates, who contended that it was an infringement upon their charter rights. The controversy was renewed the next year when the Deputies made a proposition that the General Court issue commissions "whereby power was given to seven Magistrates and three Deputies and Mr. Ward (some time pastor of Ipswich and still a preacher) to order all affairs of the commonwealth in the vacancy" of that body. (Winthrop, II, 204-5). They contended in support of this act that "the Magistrates had no power out of the General Court but what must be derived" from it. This proposition was also rejected by the Assistants as "an innovation upon the charter." They were then tendered "a commission for war only," which they likewise rejected. They also refused to suspend the exercise of their executive power until the matter could be settled at the next General Court. (*Ibid.*, 204-206).

<sup>3</sup>Winthrop, II, 282-284. They enacted such "a body of law, with pre-script penalties in all cases" that "nothing might be left to the discretion of the Magistrates." Many of them were agreed upon by the Magistrates, but they finally returned some with their non-concurrence. The Deputies then complained that the Magistrates "would have no laws." They also expressed opinions contrary to the decision of the Magistrates when acting in this capacity,—all of which tended "to weaken the authority of the Magistrates and their reputation with the people." (*Ibid.*).

In the second charter<sup>1</sup> provision was made for the establishment of a Council of twenty-eight members<sup>2</sup> to be chosen by the Assembly, subject to the approval of the Governor. The executive powers of this body differed somewhat from those which it had previously exercised. It was deprived of the power to grant land,<sup>3</sup> but in connection with the Governor, was given authority to nominate and appoint judges, commissioners of Oyer and Terminer, sheriffs, provosts, marshalls, justices of the peace and other officers of the "Council and Courts of Justice,"<sup>4</sup> to issue warrants for disposing of public revenues;<sup>5</sup> and to exercise martial law upon the inhabitants.<sup>6</sup> It also gave the entire executive authority into the hands of the Council upon the death or absence of the Governor and the Lieutenant Governor.<sup>7</sup> In addition to these duties, numerous other executive powers were granted it by the legislature from time to time.<sup>8</sup>

<sup>1</sup>The temporary and reactionary periods of Andros' rule demands no attention in this connection.

<sup>2</sup>This requirement was not always strictly observed. Between 1741 and 1766, whenever the Governor rejected any of the twenty-eight names suggested by the Assembly, their places were left vacant, the Assembly refusing to nominate others by way of retaliation. (Hutchinson, III, p. 152). This finally led to the formation of a list of "Mandamus Counsellors." (Palfrey, IV, 433).

<sup>3</sup>*Acts and Res. of the Prov. of Mass. Bay*, I, 17.

<sup>4</sup>*Ibid.*, 12; Douglass' *Summary of Amer.*, I, 473, 486.

<sup>5</sup>*Acts and Res.*, 16, 218; Randolph's *Pres. State of New England* in Perry, 19; Palfrey, III, 74.

<sup>6</sup>*Acts and Res.*, I, 18.

<sup>7</sup>*Ibid.*, 19, VII, 283, note; Poore's *Charters and Constitutions*, I, 953. The administration devolved upon the Council for the first time, July 7, 1701, though there was at that time some doubt as to whether the Council or its President should exercise this function. (Hutchinson, II, 117). In 1704, the Queen directed that under such circumstances the eldest counsellor should preside, but it was never observed, because contrary to the charter. (*Ibid.*, 191).

<sup>8</sup>They were given privileges to grant licenses for erecting buildings in Boston (*Acts and Res.*, I, 42, 405), admitting and removing settlers (*Ibid.*, 90, 194, 402); allowed to award bounties (*Ibid.*, 473), appoint commissioners

A conflict arose over the extent of power conferred by the clause which gave the Governor and Council authority to sign warrants for the disposal of public money. This struggle extended over a period of several years,<sup>1</sup> and was not ultimately settled until the formation of the constitution of 1780.<sup>2</sup>

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(*Ibid.*, 385, 211, 473), reward services (*Ibid.*, 424), appoint certain courts (*Ibid.*, 719), reprieve condemned persons (Randolph's *Pres. State of New Eng.*), etc.

<sup>1</sup>This power seems to have been the first under the new charter to be assailed by the Representatives. In 1695 the legislature passed an act to the effect that "no public money be or ought to be disposed of by his excellency, the Governor, and Council, but for the uses and intents of, and according to the acts by which the said money is raised." (*Acts*, 170). This act was repealed by the King in Council a year later. (*Ibid.*, note). By degrees, however, the House "acquired from the Governor and Council the keys of the treasury," and by the year 1723, "no moneys could be issued without the vote of the House for that purpose" (Hutchinson, II, 266), and the right of the Representatives to originate money bills was undisputed. "But they went further and intrenched upon the charter rights of the Council and allowed no payment to be made for services until they had judged whether they were performed and had passed a special order for such payment." (*Ibid.*). They even voted that there should be paid out of the treasury to the Speaker of the House 300 pounds sterling "to be applied as they should direct." After about three weeks of altercation, it was agreed that 100 pounds should be so allowed, and that 200 pounds be paid to such agent as should be chosen by the whole Court. (*Ibid.*, 272-3). The House gained the point at issue, and continued to designate the objects for which moneys were raised, thus leaving nothing to the discretion of the Governor and Council, until 1729, when Governor Shute vetoed an appropriation bill for this reason. (*Ibid.*, 322). The dispute which followed was settled unfavorably for the House. (*Ibid.*, 338-9). In 1732, the Representatives succeeded in passing a bill not materially differing from the old method. (*Ibid.*, 339). In 1733, they successfully claimed a right to audit the public accounts. In later years grants for the defense of the province were so made that the Governor and Council were restrained from drawing money from the treasury "for any other purpose." Governor Pownall submitted to this invasion only under protest, on January 25, 1758, though his predecessor had allowed it without complaint. (*Ibid.*, III, 66-67). In 1762, the House remonstrated against the method in which this power had been exercised, stating that it was taking away "their most darling privilege," and that it was "annihilating one branch of the Legislature." (*Ibid.*, 97). On this subject, see also Minot's *Hist. of Mass.*, II, 65 *et seq.*

<sup>2</sup> See *infra*.



*Section III.—The Judicial Function.*

One of the many serious defects of the first charter was its failure to provide for the erection of a judicial system. Upon the transference of the government to the colony, the Assistants took advantage of this defect and, realizing the necessities of the colony, clothed themselves in judicial ermine and transformed their court into a tribunal of justice.<sup>1</sup> Their magisterial power, once conceded<sup>2</sup> in time of necessity, remained very extensive during the existence of the first charter.<sup>3</sup> In this capacity they served not only in the General Court, which by the law of 1634, was declared "the chief civil power of the Commonwealth,"<sup>4</sup> but in the "great Quarter Court" of appeals established in 1635-6,<sup>5</sup> the semi-annual "Court of Assistants" organized in 1639,<sup>6</sup> as well as in the capacity of

<sup>1</sup> *Puritan Commonwealth*, 78.

<sup>2</sup> *Mass. Col. Rec.*, I, 89.

<sup>3</sup> Washburn's *Judicial Hist. of Mass.*, 42.

<sup>4</sup> *Col. Laws* (ed. 1660), 88. Latchford, in his *Plain Dealing*, written about 1640, says of the General Courts, "They have the power of Parliament, King's Bench, Common Pleas, Chancery, High Commission and Star Chamber, and all other Courts of England."

<sup>5</sup> *Mass. Col. Rec.*, I, 169; Hubbard, 243.

<sup>6</sup> *Col. Laws*, 23, 90. Randolph, writing in 1676, says: "There be two Courts of Assistants yearly kept at Boston by the Governor or Deputy Governor and the rest of the Magistrates upon the first Tuesday in March and the first Tuesday in September, to hear and determine all actions of appeal from inferior courts and all capital and criminal causes extending to life, member or banishment." (*Pres. State of New Eng.* in Perry's *Historical Papers*, etc., 3). They also exercised "admiralty jurisdiction and appellate jurisdiction in matters of probate." (Washburn, 30; Chalmers, 436). In fact, the jurisdiction of this Court was as extensive as that of the General Court (Washburn, 29) which retained only appellate power (*Col. Laws*, 45) except in chancery cases over which it exercised original jurisdiction until 1685, when a subordinate system of chancery was established. (Washburn, 28). After 1642 the General Court exercised appellate jurisdiction over criminal cases only. (*Col. Laws*, 199).

*ex officio* justices in the lower courts of the colony,<sup>1</sup> and individual magistrates in the town where they resided.<sup>2</sup>

Under the second charter, which left to the legislature the establishment of courts of judicature, the judicial power of the Governor and Council was greatly diminished.<sup>3</sup> In fact, they were granted jurisdiction only in cases of probate<sup>4</sup> and divorce. These duties, however, soon proved too onerous, and the Governor and Council, by the right of substitution which they possessed as a civil law court, created Judges of Probate in every county, from whose decisions appeals could be taken to them as a Supreme Court of Probate.<sup>5</sup> Thus, by the end of the colonial period, the Council had reduced its judicial duties to a minimum, retaining little more than appellate jurisdiction over a very limited field of judicature.

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<sup>1</sup> Hutchinson, II, 21; *Mass. Col. Rec.*, I, 169, 175; Hubbard, 234.

<sup>2</sup> This seems to have been the origin of the civil jurisdiction of Justices of the Peace in Massachusetts, though Stearns (*Real Actions*, 506) thinks it began with the act of 1644, and Judge Parsons (*M. R.*, IV, 515) says that Justices of the Peace were not known as officers under the first charter. The limiting of their individual jurisdiction was first placed at 20 shillings, but was subsequently (1644) raised to 40. Randolph (*Pres. State of New Eng.* in Perry's Hist. Papers, 3) says that "every Magistrate is a Justice of the Peace and can determine any cause under forty shillings, can commit to prison and punish offenders for breach of laws and impose fines according to discretion." See Washburn, 36; also Chalmers, 37; *Mass. Col. Rec.*, I, 276.

<sup>3</sup> The powers of the General and the Assistants' Courts were granted to a Superior Court, those of the County Courts to Courts of Common Pleas and Quarter Sessions, while the regular Probate Courts exercised a part of the former powers of the County Courts and the jurisdiction of the Magistrates and Commissioners of small causes was exercised by Justices of the Peace. Probate and divorce matters were left to the Governor and Council, whose decisions were rendered by a major vote of the whole Court. (Hutchinson, II, 451-2).

<sup>4</sup> Washburn, 138, 187.

<sup>5</sup> Washburn, 187. When the Legislature undertook to exercise the power of creating similar courts, the King negatived the act.

*Section IV.—The Legislative Function.*

The legislative power of the Assistants, which, after the transfer of the first charter to the colony,<sup>1</sup> rose so quickly to high-tide, soon began to ebb with even greater rapidity. Only a short time after the reaction set in, this oligarchy<sup>2</sup>—for such the government under the Board of Assistants had become—was stripped of its power and replaced by a representative government, which became permanently established in 1634.<sup>3</sup>

<sup>1</sup> See *supra*.

<sup>2</sup> Chalmers, I, 157-8.

<sup>3</sup> Opposition to the Assistants originated over a question of taxation. On February 3, 1632-3, they levied a tax of eight pounds upon the inhabitants of Watertown (*Mass. Col. Rec.*, I, 93), which evoked from these people a protest that "it was not safe to pay moneys after that sort, for fear of bringing themselves and posterity into bondage." (Winthrop, I, 84; Lodge, 345). Although this particular case seems to have been amicably settled, the freemen of the colony were aroused to an assertion of their rights, and a number of reforms followed in its wake. Two months later (April 3, 1633) the powers of the Governor were definitely defined (Winthrop, I, 86), and in another month (May 9, 1633) the powers of the Assistants were restricted by a sweeping act of reform which required: 1, That the Governor, Deputy Governor and Assistants should be elected by the freemen; 2, That these officers should be "new chosen every year"; and 3, That there should be "two of every plantation appointed to confer" with the Governor and Assistants "about raising of a public stock." (*Mass. Col. Rec.*, I, 95; Winthrop, I, 90, 91; Hutchinson, I, 30; Holmes' *Annals of America*, I, 258). The last of these acts meant that the Court of Assistants was no longer recognized as a representative assembly, and that the people were determined to levy taxes only through their representatives.

The rapid acquisition of authority by representatives of the towns, and the corresponding loss of power by the Assistants, is remarkable. In 1632, representatives of the towns were permitted only to "advise" and "agree" with the Assistants on matters of taxation. Two years later they were instructed "to meet and consider of such matters as they were to take in order" at the next General Court. (Winthrop, I, 152 *et seq.*). But when they met this time they questioned the right of the Assistants to make laws, and contended that the charter granted such privileges only to the General Court. In spite of the Governor's attempt to evade the issue (*Ibid.*, 153) a body of twenty-four representatives appeared at the next General Court, and were fully incorporated into the legislative body of the colony. At

At this date the General Court became the legislature of the colony, and was composed of the Assistants who represented the colony as a whole and the Deputies who represented the towns.

For the next ten years both bodies sat as one house and usually voted together, "without any distinction, the major part of the whole number determining the vote." The number of Assistants, however, was limited by the charter, while the Deputies were allowed to increase with the formation of new towns. Hence there arose a struggle for existence, on the part of the Assistants. A Council for life was established in order to strengthen their ranks.<sup>1</sup> Yet had not the Assistants taken the following precaution, they would have lost "all their

this Court several radical reforms were introduced. Besides electing a new man for Governor, and fining the Assistants for their past conduct, the freemen enacted: 1, That the General Court alone had power to admit freemen; 2, To make laws, to elect and remove officers, and to define their duties; 3, To raise moneys and taxes and to dispose of lands; 4, That there were to be no trials for life or banishment except by a jury, or by the General Court; 5, That there were to be four General Courts held annually which were not to be dissolved without their consent; and 6, That Deputies were to be elected and given "the full power & voyces of all the . . . freemen, deryved to them for the makeing & establishing of lawes, graunting of lands, &c., & to deale in all other affaires of the comonwealth wherein the freemen haue to doe, the matter of eleccon of magistrates & other officers onely excepted, wherein euy freeman is to gyve his owne voyce." (*Mass. Col. Rec.*, I, 117-9; Hutchinson, I, 39-40; Grahame, I, 169).

<sup>1</sup>At a General Court held March 3, 1635-6, it was ordered that at the next election there should be chosen "a certaine number of Magistrates for tearme of their lives." (*Mass. Col. Rec.*, I, 167). This act so contrary to both the spirit and the letter of the Charter (*Ibid.*, 10), was passed through the combined influence of the Assistants and the clergy (Oliver's *Puritan Commonwealth*, 63), ostensibly to conform to the teachings of the Bible, but really to counteract the rapidly developing power of the freemen, by tempting over to the colony "some of the peers and other leading men who might expect at home, in due season, to be raised to the upper house." (Winthrop, I, 219-220, note). It was virtually repealed on June 6, 1639. (*Ibid.*, 363-4; Hubbard, 244; *Mass. Col. Rec.*, I, 167, 264). Savage (Winthrop, I, 364, note) observes that this is probably the only instance of an election for life to any legislative or executive office in our country.



weight in the legislative part of the government.”<sup>1</sup> Through their influence, it was enacted in 1635 that “noe lawe, order, or sentence shall passe as an act of the Court, without the consent of the great<sup>r</sup> pte of the magistrates on the one pte, & the great<sup>r</sup> number of the deputyes on the other pte; & for want of such accorde, the cause or order shalbe suspended, & if either ptie think it soe materiall, there shalbe forthwith a comittē chosen, the one halfe by the magistrates, & the other halfe by the deputyes, & the comitteē soe chosen to elect an vmpire, who togeather shall have power to heare & determine the cause in question.”<sup>2</sup> This act, however, seems to have been soon forgotten in the conflicts<sup>3</sup> which arose over the exercise of the “negative power.” The Assistants maintained that they had a charter right to such a power, while the Deputies, being in the majority, contended for a joint vote on all matters. These struggles finally resulted in the intro-

<sup>1</sup> Hutchinson, I, 396-7.

<sup>2</sup> *Mass. Col. Rec.*, I, 170.

<sup>3</sup> The first occasion for such a disagreement arose over the request of Mr. Hooker and his congregation for permission to remove to Connecticut. The Governor, two Assistants and fifteen Deputies favored the request, while the Deputy Governor, five Assistants and ten Deputies opposed it. Thus the majority vote of the two bodies taken separately differed, but on a joint ballot it stood eighteen to sixteen against the Assistants. The Assistants, however, maintained their right to negative the vote of the Deputies, and were successful through the influence of Mr. Cotton, who preached a sermon on this subject at an interval given for fasting and prayer, when the struggle had reached its height. The Deputies yielded only in this particular case, without a final concession of the point. (Winthrop, I, 167-9; Hutchinson, I, 47). For the prevention of such dead-locks in the future, the act cited above was then passed. These struggles finally terminated in the celebrated case concerning the possession of a hog. On this point a majority of the two bodies disagreed upon a separate vote. The Deputies insisted upon a joint ballot, which gave them a majority. Though the “sow business” was never decided, the controversy resulted in the settlement of the constitutional question in dispute. (Winthrop, II, 83-86, 139-143). The Magistrates offered the next year to surrender their negative power if the freemen would consent that their representatives should not exceed them in number and should be “elected by the shires instead of the towns.” The proposition was rejected and probably never again renewed. (Winthrop, II, 214).

duction of the bicameral system, and in granting to each body a negative over all the legislative acts of the other.<sup>1</sup>

From the date of this separation, March, 25, 1644, the two bodies were distinct, and their powers began to differentiate. The Deputies became what Chalmers calls "the democratic branch of the legislature,"<sup>2</sup> while the Council took on the functions of an upper house, though still retaining its separate position as an executive advisory body.

In its subsequent evolution, as a branch of the legislature, the Council underwent one radical change in membership. This was the removal of its two *ex officio* members,—the Governor and the Lieutenant Governor. The former ceased to be a member of the Legislative Council in 1716<sup>3</sup> and the

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<sup>1</sup> See Prof. T. F. Moran's *Rise and Development of the Bicameral System in America*, J. H. U. Studies, Thirteenth Series, V, 8-13. This order, not by hurtfully withdrawing a power from the Magistrates as had been attempted, but by beneficially conferring an equal power upon the Deputies, determined the great contention about the negative voice and completed the frame of the internal government of Massachusetts, destined to undergo no further change for forty years." (Palfrey, I, 259). A modification of this law was soon found necessary in judicial matters, since it would have prevented any decision in many cases. It was, therefore, agreed in 1652, that the veto power should be exercised only in legislative matters and that the two houses should vote together in their judicial capacity, when they were unable to reach a conclusion separately. (*Mass. Col. Rec.*, III, 179; IV, pt. I, 82; Hutchinson, I, 134-5).

<sup>2</sup> *Polit. Annals*, 166. Douglass (*Summary*, I, 213-4) calls the Councils the "aristocratical" and the Representatives the "democratic" elements of the colonial legislatures.

<sup>3</sup> Under the first charter, the Council was composed of the Assistants, the Governor and the Deputy Governor. It was presided over by the Governor or, in his absence, by the Deputy Governor, who was not given a veto power and was therefore in 1641 allowed a vote in its proceedings. His power as a presiding officer was little more than that of the other members. If he refused to put to vote a question opposed to his views, it could be done by any other member of the body. (Hutchinson, I, 62-3). The second charter gave him a veto power, but was silent as to whether he should be considered a member of the Council in its legislative capacity. Since departures from old precedents were made only by degrees, his claims to a seat were asserted and conceded only at intervals. Lord Bellomont (1699-1700) and Governor

latter in 1767,<sup>1</sup> but both continued to hold their positions in this body when it acted in an executive capacity.

There was also an important change in the relations between the two branches of the Legislature. The Council lost the power to originate money bills, and this function came to be exercised by the Deputies alone. On this point Hutchinson observes that the House had "by degrees acquired from the Governor and Council the keys of the treasury and no money could be issued without the vote of the House for that pur-

Dudley (1702-1716) considered themselves not only members, but heads of the Council in both its executive and legislative capacities. They sat with the Counsellors, directed their debates and proposed all their business. The Governors who came into office after 1716 neglected to contend for such privileges and thus ceased to be regarded as members of the legislative Council.

<sup>1</sup> It was evidently intended for the Lieutenant Governor to be an *ex officio* member of the upper house of the legislature under the second charter as he had been under the first. Mr. Stoughton, the first Lieutenant Governor under the second charter, though not at first elected a member of the Council was considered "a Counsellor, *ex officio*, and voted and was upon committees the whole year." (*Acts and Resolves of Prov. of Mass. Bay*, VII, 5, note; Hutchinson, II, 174). At the second election he was regularly chosen one of the twenty-eight Counsellors as well as Lieutenant Governor, and was therefore doubly entitled to a seat in that body. His immediate successors also attended the meetings of the Council whether so selected or not, but they voted in its proceedings only when elected as Counsellors. In 1732 the rights of the Lieutenant Governor to an *ex officio* seat in the Council when sitting in its legislative capacity was first challenged in the case of Mr. Phipps, who having been elected Lieutenant Governor against the desire of the Governor, was forbidden by the Governor to sit in that body "unless he should be elected by the Assembly and approved by the Governor." The question was finally settled in 1767 when Lieutenant-Governor Hutchinson failed to be elected to the Council. He was in constant attendance upon the meetings of the Council during the first session after his defeat, but "did not vote nor take any share in the debates." At the second session, however, his attendance was characterized by the House as "a new and additional instance of ambition and lust of power" (Hutchinson, III, 175 *et seq.*), and in spite of the efforts of the Governor and other friends, the House successfully maintained its position and the Lieutenant-Governor ceased to be an *ex officio* member of the upper branch of the Legislature. (*Ibid.*, 176-7).

pose.”<sup>1</sup> Hence, in 1744 the Governor requested the Assembly to grant him and his Council power “to draw upon the treasurer” as occasion might require.<sup>2</sup>

*Section V.—The Proposed Constitution of 1778.*

During the revolutionary period the Council retained the powers which had been granted by the second charter.<sup>3</sup> But the necessity for a more perfect constitution was soon recognized by the people, and efforts were early made to prepare one, although the perturbed state of society, occasioned by the war was not very favorable to such an undertaking.<sup>4</sup> To meet this necessity a committee appointed by the General

<sup>1</sup> *Hist. of Mass.*, II, 266, 303; III, 66. The struggles over the exercise of this power by the House and its effect upon the executive authority of the Council has been noted in detail. See *supra*, p. 15, note 1.

<sup>2</sup> Douglass' *Summary*, I, 473. In the preceding treatment, the development of the Council in the Plymouth colony has been omitted because the affairs of that settlement exerted little or no influence upon the constitutional development of Massachusetts into which it was merged in 1691. See Moore's *Lives of the Governors of New Plymouth and Mass. Bay*, 228. The history of the Council of New Plymouth is, nevertheless, unique because of the peculiar way in which it originated. Upon the death of Governor Carver in 1621, William Bradford was chosen Governor and he “being not yet recovered of his illness, in which he had been near y<sup>e</sup> point of death Isaak Allerton was chosen to be an Assistant unto him.” (Bradford's *Hist. of Plymouth Plantation* in *Mass. Hist. Coll.*, Fourth Series, Vol. III, 101). This choice of an Assistant which was made, not as a matter of principle but as a temporary expedient, furnished the precedent for a permanent change in the constitution of the colony. The number of Assistants was afterwards increased to five (1624) and then to seven (1633). Their duties were at first confined to the executive and judicial departments, but with the introduction of representative government they became a part of the law-making body of the colony. See Prof. G. H. Haynes' *Representation and Suffrage in Mass.*, 1620-1691, J. H. U. Studies, Twelfth Series, VIII-IX, Chapter V.

<sup>3</sup> Bradford's *Hist. of Mass.*, 40 *et seq.*

<sup>4</sup> *Ibid.*, 42.



Assembly reported to that body a draft of a constitution in January, 1778, which was rejected by the people.<sup>1</sup>

In this constitution the Senate is a more or less accurate reproduction of the Council of the second charter. Article XXXII required that all laws which "refer to and mention the Council" should be "construed to extend to the Senate."<sup>2</sup> Both instruments provided for the annual election of twenty-eight members of this body<sup>3</sup>—by the Assembly, according to the charter, but by the freemen according to the constitution.<sup>4</sup> Both required a residence qualification,<sup>5</sup> but the constitution added to this a property<sup>6</sup> and a religious<sup>7</sup> qualification, and disqualified certain other officers of the State from a seat in either branch of the General Court.<sup>8</sup> The authority of the Council under this constitution, as under the charter, was principally executive and legislative,—its judicial power being restricted to the trial of impeachments.<sup>9</sup>

When sitting in a legislative capacity both the Senate and the House of Representatives had equal rights "to originate or reject any bill, resolve or order or to propose amendments; except in case of money bills, which were to originate in the House of Representatives only."<sup>10</sup>

The Governor and Senate were to constitute the executive body of the State, the former still retaining his position as *primus inter pares*.<sup>11</sup> The executive power of the Governor, exclusive of the Upper House, was still very limited. With the advice and consent of the Senate, however, he could march

<sup>1</sup> *Ibid.*, 140. This was done chiefly because it contained no Bill of Rights. Still it is important in this connection, since it embodies the political ideas of a representative body of the people at that time, and serves as a connecting link between the colonial and state governments.

<sup>2</sup> A draft of this constitution is given in Appendix to Bradford's *Hist. of Mass.*

<sup>3</sup> Constitution, Art. VIII.

<sup>4</sup> *Ibid.*, Art. IX.

<sup>5</sup> *Ibid.*, Art. III.

<sup>6</sup> *Ibid.*, Art. III.

<sup>7</sup> *Ibid.*, Art. XXIX.

<sup>8</sup> *Ibid.*, Art. IV.

<sup>9</sup> *Ibid.*, Art. XX.

<sup>10</sup> *Ibid.*, Art. XIV.

<sup>11</sup> *Ibid.*, Art. XVII, XXII.

the militia out of the State ;<sup>1</sup> prorogue the General Court ;<sup>2</sup> lay an embargo and prohibit the exportation of any commodity for a limited time ;<sup>3</sup> appoint all officers, both civil and military, whose appointment was not reserved to the General Court,<sup>4</sup> and sign warrants for the disposal of all public money, "agreeably to the acts and resolves of the General Court."<sup>5</sup> "In case of a vacancy in the office of Governor and Lieutenant Governor," the executive authority was to devolve upon "the major part of the Senate."<sup>6</sup>

*Section VI.—The Constitution of 1780.*

A second and more successful effort at constitution-making was made in 1780.<sup>7</sup> This instrument marks the last step in the evolution of the Senate. Then for the first time in the history of Massachusetts, were the executive, legislative and judicial powers emphatically declared "separate and distinct."<sup>8</sup> The powers formerly exercised by the Council were, therefore, delegated to two separate bodies,<sup>9</sup>—a Senate, which performed the legislative, and a newly created Council, which performed the executive and advisory function. The qualifications for

<sup>1</sup> *Ibid.*, Art. XVII.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*, Art. XXI.

<sup>4</sup> *Ibid.*, Art. XIX.

<sup>5</sup> *Ibid.*, Art. XXXII. This limit to the power of the Council had been a cause of contention for several years. See *supra*.

<sup>6</sup> *Ibid.*, Art. XVIII.

<sup>7</sup> A copy of this constitution is given in Poore's *Charters and Constitutions*, I, 956–973.

<sup>8</sup> Bill of Rights, Art. XXX. Yet "all causes of marriage, divorce and alimony and appeals from the judges of probate" were to be "heard and determined by the Governor and Council" until the General Court should make other provisions. (Chap. III, Art. 5). These were the last remnants of judicial power exercised by the Governor and Council under the second charter.

<sup>9</sup> The seats of senators elected to the Council were declared vacant. (Chap. II, Sec. 3, Art. II).

membership in each body were the same,<sup>1</sup> and their members were chosen at the same time and in the same way—a fact which suggests their common origin.<sup>2</sup> This method of election was of a double nature and combined the practices under both charters—an election by the people and then by the General Court.<sup>3</sup>

The Executive Council consisted of nine persons besides the Lieutenant Governor,<sup>4</sup> five of whom constituted a quorum. It was convened at the discretion of the Governor, “for the ordering and directing the affairs of the commonwealth according to the laws of the land.”<sup>5</sup> As under the second charter, the Council assumed the functions of the chief executive upon the vacancy of the office of Governor and Lieutenant Governor.<sup>6</sup> With the advice and consent of the Council, the Governor could exercise the pardoning power,<sup>7</sup> appoint judicial officers, fill vacancies under certain conditions,<sup>8</sup> and appoint such officers of the continental army as were allowed to the State by the Confederation of the United States. The power to advise the Governor as to the signing of warrants for the disposition of public moneys, which was first granted to the

<sup>1</sup> These qualifications were “a freehold within the commonwealth of the value of three hundred pounds,” “personal estate to the value of six hundred pounds,” a residence of five years within the State and a residence within the district for which he is chosen at the time of his election. (Chap. II, Sec. 2, Art. V).

<sup>2</sup> Members of both bodies were elected by the Senators and Representatives on a joint ballot from a list of forty names which were chosen by the people “to be Counsellors and Senators.” (Chap. I, Sec. 2, Art. I; Chap. II, Sec. 3, Art. II).

<sup>3</sup> Chap. I, Sec. 2, Articles I, II.

<sup>4</sup> Under the charters the Governor and Lieutenant Governor came to be members of the Council only in its executive capacity. See *supra*.

<sup>5</sup> Chap. II, Sec. I, Art. IV; *Ibid.*, Sec. 3, Art. I.

<sup>6</sup> Chap. II, Sec. 3, Art. VI.

<sup>7</sup> Chap. II, Sec. 1, Art. VIII. Under the second charter the Governor and Council were allowed to grant only reprieves, while the power to grant pardons rested with the General Court.

<sup>8</sup> *Ibid.*, Art. IX.

Council by the second charter, was renewed in the Constitution of 1780 with a few exceptions.<sup>1</sup>

The legislative department was composed of a Senate<sup>2</sup> and a House of Representatives, each of which had a negative on the other.<sup>3</sup> The two bodies differed as to privileges in only two respects: (1), The Senate had power to try impeachments,<sup>4</sup> and (2), The House had exclusive right to originate money bills.<sup>5</sup>

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<sup>1</sup> *Ibid.*, Art. XI. These exceptions applied to "such sums as may be appropriated for the redemption of bills of credit or treasurer's notes or for the payment of interest."

<sup>2</sup> This body consisted of thirty-one members,—nine out of the list of forty returned for "Counsellors and Senators" (*supra*, 26, note 2) being chosen for the former office. The Senators were apportioned according to districts (Chap. I, Sec. 2, Art. I).

<sup>3</sup> Chap. I, Sec. 1, Art. I. This question was brought up and settled under the first charter. See *supra*.

<sup>4</sup> Chap. I, Sec. 2, Art. VIII. The party so convicted was, nevertheless, "liable to indictment, trial, judgment and punishment according to the laws of the land."

<sup>5</sup> Chap. I, Sec. 3, Art. VII. This power was acquired under the second charter. See *supra*.



## CHAPTER II.

### CONNECTICUT.

#### *Section I.—Governmental Beginnings.*

Whatever may have been the occasion for the removal of the inhabitants of Newtown (Hartford), Dorchester (Windsor) and Watertown (Wethersfield) from their first location in Massachusetts to the region of the Connecticut River,<sup>1</sup> they carried with them the form, if not the spirit, of the political and religious institutions of the mother colony,<sup>2</sup> under whose government they continued for several months after their removal.<sup>3</sup> Their only assembly was a court held at each town in turn and composed of two magistrates from each, except when

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<sup>1</sup> Doyle (*Eng. Colonies in Amer.*, II, 159) thinks that they did not withdraw "out of any dissatisfaction or with any craving for political changes," while Johnston (*Conn., Amer. Commonwealth Series*, 64) characterizes this removal as "a secession of the democratic element from Massachusetts." On this subject see also Trumbull's *Memorial History of Hartford County*, I, 19 *et seq.*

<sup>2</sup> Morey's *Genesis of a Written Constitution*, *Annals of Amer. Acad.*, I, 551; Johnston's *Genesis of a New Eng. State*, *J. H. U. Studies*, First Series, 13-14; Palfrey, I, 233; Bond's *Hist. of Watertown, Mass.*, I, 980; Hartley's *Hartford in the Olden Time*, 49; Stiles' *Hist. of Ancient Windsor*, 25, note; Loomis and Calhoun's *Judic. and Civil Hist. of Conn.*, 2. Even their Massachusetts magistrates and ministers (except the minister at Watertown) removed with them. On the extent of authority delegated to these Massachusetts magistrates see Hazard, I, 322.

<sup>3</sup> Andrews' *River Towns of Conn.*, *J. H. U. Studies*, Seventh Series, VII, VIII, IX, 78-81; Loomis and Calhoun, 3-4; *Memorial Hist. of Hartford County*, I, 105.

Pyncheon, the Magistrate from Agawam<sup>1</sup> (Springfield) was present and raised the number to seven. Its members were commissioned by the General Court of Massachusetts, and their executive, judicial and legislative power was practically supreme.<sup>2</sup> Eight sessions of this court were held before the meeting of the first General Court of the colony, which assembled at Hartford, May 1, 1637. Unlike the former courts, it was composed of the Magistrates, Assistants or Commissioners,<sup>3</sup> who had previously held such meetings, and of nine Deputies here called "Committees," three of the latter being from each of the three towns. Thus, instead of slowly working out a system of representation by a "series of expedients and compromises," the principle of democracy early asserted itself in the constitution of this "binal assembly."<sup>4</sup> Here we find the germs of the Senate and House of Representatives of the future State of Connecticut. They became permanently embodied in the political system of the colony by the enactment of the "Fundamental Orders" on January 1, 1638-9.<sup>5</sup> Under this constitution the government was organized upon a basis from which only a few permanent

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<sup>1</sup> This was a newly settled town, situated so near the boundary between Massachusetts and Connecticut that it was, for several years, uncertain to which it belonged. See Palfrey, I, 235.

<sup>2</sup> For their commission see *Mass. Col. Rec.*, I, 170.

<sup>3</sup> The title of these "Magistrates" was not fixed before the Constitution of 1638-9. Dr. Bronson thinks they were chosen by the newly elected Deputies. (*Early Gov. of Conn.* in New Haven Hist. Soc. Papers, III, 297).

<sup>4</sup> Johnston's *Genesis of a New Eng. State*, 14. In commenting upon this assembly the author further says, "so complete are the features of Statehood, that we may fairly assign May 1, 1637, as the proper birthday of Connecticut." (*Ibid.*).

<sup>5</sup> This instrument, which Mr. Bryce calls "the oldest truly political Constitution in America" (*American Commonwealth*, ed. 1893, I, 429, note), provided for a government similar in all essential respects to that of Massachusetts.

departures<sup>1</sup> were made previous to the adoption of the constitution of 1818. The charter of 14 Charles II was practically a royal confirmation of this instrument and, instead of altering the government of the colony, put it on a surer footing and extended the limits of the colonial jurisdiction.<sup>2</sup>

Throughout the colonial and early state history of Connecticut the Assistants were chosen from the colony as a whole and the composition of the Council<sup>3</sup> remained practically unchanged except in the number of its members.<sup>4</sup> During this entire time the Governor and Deputy Governor retained their positions as *ex officio* members of this body when acting in every capacity; and one of them always presided when present. Citizenship in the colony seems to have been the only qualification for membership in this body.

The powers of the Council were, at first, confined chiefly to the judicial and legislative departments. In the course of time, however, it entered more fully upon the executive domain. The wording of the Fundamental Orders clearly indicates that its framers, who were fresh from the conflicts that had been so fiercely waged between the patricians and the

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<sup>1</sup> Although, as is well known, Andros failed to take away the charter of Connecticut, he took the government into his hands in 1687. But upon his imprisonment in 1689 the old officers, after an interruption of nineteen months, resumed their duties according to the charter. (*Conn. Col. Rec.*, III, 250; Palfrey, II, 384-5; Turnbull's *Hist. of Conn.*, I, 376-7).

<sup>2</sup> Loomis and Calhoun, 104-5. This charter is almost an exact reproduction of the Massachusetts charter of 1628, with an additional provision recognizing a representative system. It led to the absorption of the New Haven colony and the loss of all its characteristic institutions. (Atwater's *Hist. of New Haven*, 520-7). Hence the history of this colony demands no consideration in this connection.

<sup>3</sup> This term is used in anticipation of the subsequent history of this body, since it does not appear in the records before those who had been called "Magistrates" in the Fundamental Orders (*Conn. Col. Rec.*, I, 21) and "Assistants" in the charter (*Ibid.*, II, 4) came to acquire executive power.

<sup>4</sup> According to the Fundamental Orders it consisted of at least six members while the charter required a membership of at least twelve.

plebs of the mother colony, were still disposed to regard the Magistrates with a high degree of jealousy and suspicion.<sup>1</sup>

*Section II.—The Executive Function.*

In no part of the Fundamental Orders was this predilection shown more clearly than in the limitations placed upon the exercise of the modicum of executive power, which it granted this body. To be sure, "the Gou<sup>r</sup>nor and the gretest p<sup>r</sup>te of the Magestrats" were given power to convene the General Court in either regular or special sessions;<sup>2</sup> but it was also provided that in case they should "neglect or refuse to call the two Generall standing Courts or ether of thē, as also at other tymes when the occasions of the Co<sup>m</sup>onwealth" required, "the Freemen . . . or the Mayor p<sup>r</sup>te of them" were given power to petition to them "soe to do;" and "if then yt be ether denied or neglected" this power could be exercised by the freemen themselves.<sup>3</sup>

In the course of time, however, this jealousy was somewhat allayed, and at the General Court of March, 1662-3, "the Assistants . . . on the Riuer" were given power to act in "y<sup>e</sup> vacancy of the sitting of the Generale Court" "in all necessary concernments, both miletary and civile, according as the p<sup>r</sup>sent exegents require and call for."<sup>4</sup> Before that time specific matters pertaining to the executive function of the government<sup>5</sup> were often referred to the Particular Court of Assistants, or to individual Magistrates,<sup>6</sup> but they had never before been authorized to act in *all* "necessary concernments." Although

<sup>1</sup> Dr. Bronson (*Early Gov. of Conn.*—New Haven Hist. Soc. Papers, III, 318) observes that these people "had witnessed the struggle in Massachusetts between the aristocratic and republican members of the government . . . were on the popular side and took effectual measures to circumscribe patriotic ambition."

<sup>2</sup> Orders 6 and 10.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Conn. Col. Rec.*, I, 397.

<sup>5</sup> *Ibid.*, I, 397.

<sup>6</sup> *Ibid.*, 71, 255, 277, etc.



this order was repealed in April, 1665,<sup>1</sup> the Governor and the Assistants still continued to perform executive duties in the intervals of the General Court.<sup>2</sup> In July, 1675, executive power was granted to the Governor, Deputy Governor and Assistants with four other persons.<sup>3</sup> Similar councils were constituted from time to time,<sup>4</sup> until May, 1677, when the membership of the Executive Council was, for the first time, restricted to the Governor, Deputy Governor and the whole body of Assistants.<sup>5</sup> It remained unchanged in composition until the usurpation of Andros. After that time it varied greatly as to its powers and composition, though the right of any of the Assistants to membership in the Executive Council was never denied.<sup>6</sup>

In the answers of the General Court to the queries of the Lords of the Committee of Colonies given in July, 1680, the powers and the composition of the Standing Council are thus stated: "As there is any special occasion the Governor calls his Assistants, who are his Council, to meet and consider of such matters as fall in the interval of the General Courts, and determine the same."<sup>7</sup>

In the latter part of the colonial period many powers which had been formerly delegated to the Council came to be exercised by the Governor alone.<sup>8</sup> Thus at a comparatively early date there began to appear indications of an evolutionary process which ultimately resulted in a complete absorption of the executive function by the Governor.

<sup>1</sup> *Ibid.*, 94, 188, 316, etc.

<sup>2</sup> *Ibid.*, 440. The records contain the proceedings of as many as three such meetings between the 1st and 9th of July, 1675, the date when the Council was revived. See *Ibid.*, II, 331 *et seq.*

<sup>3</sup> *Ibid.*, 261.

<sup>4</sup> *Ibid.*, 284, 289.

<sup>5</sup> *Ibid.*, 316-7.

<sup>6</sup> Unlike the Council of the mother colony, that of Connecticut was strictly subordinate to the General Assembly and was dependent upon that body for all its powers and even for its very existence.

<sup>7</sup> *Conn. Col. Rec.*, III, 294; Chalmers' *Annals*, 307.

<sup>8</sup> Cf. *Conn. Col. Rec.*, VIII, 87, 376, with X, 350, 424, 461, 485, 550; VIII, 326, with X, 348, XI, 99, 126, 234, 354, 486, XIV, 430; VII, 77-8, VIII, 440, 461, with X, pp. 483-4, etc.

*Section III.—The Judicial Function.*

At the beginning of the government of Connecticut, the judicial duties and powers of the Counsellors extended to all the tribunals that existed in the colony previous to the granting of the charter. As in Massachusetts, they were not limited to the general judicial authority which they performed as members of the General Court.<sup>1</sup> They also exercised judicial power in the Particular Court,<sup>2</sup> which from 1638 to 1665 constituted the highest strictly judicial tribunal in the colony.<sup>3</sup>

Upon the reorganization of the government of the colony under the charter, several important changes were made in the judicial system in order to meet the needs of an increased population and an extended territory.

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<sup>1</sup> In both colonies the legislative body received not only the name but the authority of a judicial tribunal. This power cannot be said to have been completely surrendered by this body until the formation of the constitution of 1818. In 1726 an appeal to the King in Council was refused John Winthrop because he had not previously referred his case to the Assembly as the Supreme Court of the colony. (*Conn. Col. Rec.*, VII, 20). From time to time, however, appeals to the General Assembly became so numerous that various expedients were resorted to in order to restrict them. See Loomis and Calhoun, 106-7, 132.

<sup>2</sup> *Conn. Col. Rec.*, I, 21. It was composed at first of the Governor or Deputy Governor and a majority of Magistrates, but after May, 1647, the Governor, or Deputy Governor and two Magistrates were empowered to hold its sessions. It met four times a year and tried all cases of appeal from the lower courts and all other causes exceeding forty shillings. At first all causes were tried by a jury which seems to have been in attendance from the first institution of this court. (Trumbull, I, 125). After February, 1644, causes under forty shillings were tried by the Magistrates without a jury (*Conn. Col. Rec.*, I, 118, 535), and in cases when juries were employed, the Magistrates were granted great discretionary power in affixing penalties (*Ibid.*, 138, 324), and they were even allowed to set aside the verdict of a jury when, according to their judgment, it was unjust (*Conn. Col. Rec.*, I, 117, 118); and to decide all cases whereon the jury disagreed (*Ibid.*, 85). After March, 1662-3, persons convicted before this Court "for a misdemeanor" were allowed an appeal to the General Court (*Ibid.*, 395). See also Loomis and Calhoun, 126-7.

<sup>3</sup> *Memorial Hist. of Hartford County*, I, 109.

The General Court, or General Assembly as it was then called, still exercised judicial power and, in fact, continued to do so, to a greater or less degree, until the formation of the constitution of 1818.

The powers which had been exercised by the Particular Court were divided between two newly created tribunals,—the County Courts and the Court of Assistants. From 1666 to 1698 the County Courts<sup>1</sup> consisted of one Assistant, or “as we would now say Senator,”<sup>2</sup> and at least two Commissioners or of any three Assistants.<sup>3</sup> In 1698, however, the Assistants ceased to be *ex officio* members of these tribunals,<sup>4</sup>—this being the first instance of a diminution in the judicial powers of this body during its process of evolution into a Senate.

In October, 1665, the Court of Assistants succeeded the Particular Court as the highest strictly judicial body in the colony.<sup>5</sup> The membership of this new court was also confined to the Governor, or Deputy Governor and Magistrates, who at this time came to be called Assistants.<sup>6</sup> It existed until 1711<sup>7</sup>

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<sup>1</sup> The first County Court was established in May, 1665, for the New Haven colony, which had just lost its General Court. (Trumbull, I, 276-7). A similar court was also established at New London at the same date. (*Ibid.*). In October of the same year a similar court was established for Hartford (*Conn. Col. Rec.*, II, 29), and the next year they were established for all the counties of the colony. (*Ibid.*, 35). They were composed at first of two Assistants and three Justices of the Quorum. (Trumbull, I, 276-7).

<sup>2</sup> *Memorial Hist. of Hartford County*, I, 110.

<sup>3</sup> *Conn. Col. Rec.*, II, 35.

<sup>4</sup> After 1698 they were composed of one judge and from two to five Justices of the Peace and Quorum. The jurisdiction of these courts, while composed of Assistants, extended to all cases, both civil and criminal, except those involving life, limb, or banishment. Causes involving more than twenty shillings were tried by a jury.

<sup>5</sup> *Conn. Col. Rec.*, II, 28-9.

<sup>6</sup> *Ibid.*; *Memorial Hist. of Hartford County*, I, 113; Loomis and Calhoun, 129. It was empowered to meet twice a year, to hear and determine appeals from the lower courts and to try capital offences and crimes respecting life, limb, or banishment. Appeals were tried by a jury “if the nature of the case required.” (*Conn. Col. Rec.*, II, 29; III, 294; Chalmers, 307). It was also granted jurisdiction in cases of divorce and the powers of a Court of Admiralty. (Loomis and Calhoun, 129).

<sup>7</sup> Owing to a typographical error, Loomis and Calhoun (p. 131) give 1811 as the date of this change.

when it was succeeded by the Superior Court of the colony, both of which had practically the same composition and power. In 1784 an act was passed by the General Assembly declaring that the office of judge of this court was incompatible with membership in the Assembly, or in the Congress of the United States.<sup>1</sup> This seems to have been the second instance in which the judicial powers of the Senate were limited in the process of its evolution into a strictly legislative body.

In 1784 a Superior Court of Errors was established. It consisted of the Governor, Lieutenant Governor<sup>2</sup> and Assistants.<sup>3</sup> The defects in the composition of this tribunal soon became apparent,—since its membership was determined with reference to the position the Assistants were to hold in the General Assembly, which was the larger and more important body.<sup>4</sup> The Assistants were chosen because of their qualifications as legislators, rather than judges, hence the judicial system felt the evil effects of this law. It was therefore repealed in 1806, and from that date this tribunal was composed of the several judges of the Superior Court instead of the Senators serving in an *ex officio* capacity.<sup>5</sup> This was the third and last step in limiting the judicial powers of the Senate previous to the adoption of the Constitution of 1818.

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<sup>1</sup> Loomis and Calhoun, 133.

<sup>2</sup> Loomis and Calhoun (p. 133) say that the Governor became a member of this tribunal in 1793, while *Memorial Hist. of Hartford County* (I, p. 113) gives this date as the time when the Lieutenant Governor was admitted to it.

<sup>3</sup> This court was held at first annually, alternating between Hartford and New Haven. In 1801 it was enacted that this body should consist of six members and was to hold two sessions in each county annually, one in summer and the other in winter. (Loomis and Calhoun, pp. 133-4). Its jurisdiction extended to all cases which had previously gone before the General Assembly by writ of error. Civil actions had been excluded from the General Assembly since May, 1697. (*Conn. Col. Rec.*, IV, 200).

<sup>4</sup> Loomis and Calhoun, 133-4.

<sup>5</sup> *Ibid.*; Pease and Niles' *Gazetteer of Conn. and R. I.*, ed. 1819, 18.



*Section IV.—The Legislative Function.*

Legislative authority was vested solely in the General Court or Assembly,<sup>1</sup> which was composed of two branches,—the upper consisting of the Magistrates or Assistants<sup>2</sup> elected by the freemen at large and the lower of Deputies, or Representatives chosen by the several towns. They occupied the same chamber and were presided over by the Governor, or Deputy Governor, or in the absence of both by a Moderator.<sup>3</sup> Two sessions of this court were held annually. The fall term was for the “making of laws,” while the spring term was for the election of officers, after which it might “proceed in any public service as at other courts.”<sup>4</sup> Each session, however, embraced many meetings, which were adjourned from time to time and thus extended over a period of several months. The legislative power of this court extended over the whole colony and was practically unrestricted.<sup>5</sup>

It was found necessary to make only a few changes in the privileges of the two branches of the General Court and in their relations to each other. For the first six years after the organization of the government, the two branches sat together and voted as one body. Of course, this gave a great advantage to the larger branch. After the lapse of six years, however, the prejudice against the Magistrates, as shown in the Fundamental Orders, had abated to such an extent that the Deputies were willing to make a heroic sacrifice of the advantage they

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<sup>1</sup> *Conn. Col. Rec.*, III, 295.

<sup>2</sup> Dr. Bronson (*Early Government of Conn.*—New Haven Hist. Soc. Papers, III, 317) judging by the wording of the Fundamental Orders and by the state of mind of its framers, thinks that the granting of legislative power to the Magistrates was “an after-thought” and that “it is not in harmony with the other parts of the Constitution.”

<sup>3</sup> *Conn. Col. Rec.*, II, 24–5.

<sup>4</sup> *Ibid.*, 22.

<sup>5</sup> Loomis and Calhoun, 103. The charter forbade the enacting of laws “contrary to the laws and statutes of the realm of England,” but no provision was made for its enforcement. (Palfrey, II, 41).

held over the minority. On February 5, 1644-5, an act was passed granting to each body "a negative voice" upon the actions of the other.<sup>1</sup> This "important concession on the part of the popular majority" was the first instance in which separate rights were accorded to each body. The passage of this act was probably due to the combined influence of the mother colony, which had just introduced the bicameral system,<sup>2</sup> and the "increasing weakness of the aristocratic party in England."<sup>3</sup> In 1724 it became necessary to make an exception to it in the election of Governor.<sup>4</sup>

The second step in the evolution of the Council as a legislative body was taken in October, 1698, when it was enacted that the General Court, or Assembly which had hitherto constituted a unicameral body should be divided into two separate branches, the first of which was to consist of the Governor, or Deputy Governor and Assistants, and was to be "known by the name of the Upper House."<sup>5</sup> The Governor was not given a veto power, but, as President of the Council, was allowed a casting vote in case the vote of that body should be equally divided.<sup>6</sup> Any bill could originate in either house but was not allowed to have the force of law without the concurrence of the other. This act was put into execution at the next meeting of the Assembly, held in May, 1699.<sup>7</sup> No subsequent change was made in the rights and functions of the Upper House nor in its relations to the popular branch during the colonial and early state history of Connecticut. This colony did not follow the example of most of the other colonies and

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<sup>1</sup> *Conn. Col. Rec.*, I, 119.

<sup>2</sup> See *supra*.

<sup>3</sup> Bronson, 321.

<sup>4</sup> *Conn. Col. Rec.*, VI, 415, note, 483-4. Other officers were still chosen by the two bodies sitting apart. (*Ibid.*, 377).

<sup>5</sup> *Ibid.*, IV, 267, 282; Trumbull, I, 399; Palfrey, III, 208; Loomis and Calhoun, 106.

<sup>6</sup> Douglass, *Summary*, II, 168.

<sup>7</sup> *Conn. Col. Rec.*, IV, 282. On this subject see also Prof. T. F. Moran's *Rise and Development of the Bicameral System in America*, J. H. U. Studies, Thirteenth Series, V, 16-22.

adopt a new constitution upon emerging into statehood, but continued its government after the ancient form, a statute being enacted the session after the memorable 4th of July, 1776, which provided that the government should continue to be organized and administered according to the provisions of the charter.<sup>1</sup>

### *Section V.—The Constitution of 1818.*

The final step in the process of evolution was taken upon the formation of the first state constitution in 1818. It provided for the definitive separation of the three functions of government.<sup>2</sup> The executive and judicial powers of the Council were taken away and the body was erected into a true Senate.<sup>3</sup> Its membership remained the same in number<sup>4</sup> and was still chosen from the State at large.<sup>5</sup> There was, however, a change as to its composition. Owing to the separation of

<sup>1</sup> Pease and Niles' *Gazetteer of Conn. and R. I.*, 18. The changes occasioned by the transition from colony to state were very slight. In 1775 the regnal year disappeared from the head of the records. (*Conn. Col. Rec.*, XV, 185, note). In June, 1776, acts were purported to be passed by the "General Court or Assembly of the English Colony of Connecticut in New England," while in October of the same year they were said to be by the "State of Connecticut in New England." (*Memorial Hist. of Hartford County*, I, 107).

Instead of forming a new constitution the inhabitants of Connecticut contented themselves with their old charter of 1662, to which they merely prefixed a Bill of Rights. This Bill of Rights (Paragraph I) begins as follows: "*Be it enacted and declared by the Governor, and Council, and House of Representatives, in General Court assembled, That the ancient Form of Civil Government, contained in the Charter from Charles the Second, King of England, and adopted by the People of this State, shall be and remain the Civil Constitution of this State, under the sole authority of the People thereof, independent of any King or Prince whatever.*"

<sup>2</sup> Articles II; X, Sec. 4.

<sup>3</sup> Article II, Sec. 1.

<sup>4</sup> Cf. Article III, Sec. 4, with *Conn. Col. Rec.*, II, 5.

<sup>5</sup> Article III, Secs. 5-6. A change was made in this feature of the constitution by an amendment ratified in November, 1828, which required the choice of Senators according to districts. (Amendments to the Constitution of 1818, Art. II).

governmental functions, the Governor, who now became the chief executive of the State,<sup>1</sup> no longer retained his seat as an *ex officio* member of the Senate,<sup>2</sup> and the Lieutenant Governor succeeded to the position of president of that body, a duty which he had always performed in the absence of the Governor.<sup>3</sup> The casting vote which had been accorded the presiding officer in the Council was still retained,<sup>4</sup> and the veto power of the Governor was introduced for the first time in the history of the State.<sup>5</sup>

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<sup>1</sup> Article IV, Sec. 1.

<sup>2</sup> The only qualification for membership in this body seems to have been citizenship within the State.

<sup>3</sup> Article IV, Sec. 13.

<sup>4</sup> Cf. Article IV, Sec. 13, with *Conn. Col. Rec.*, I, 25.

<sup>5</sup> Article IV, Sec. 12.



## CHAPTER III.

### NEW HAMPSHIRE.

#### *Section I.—Governmental Beginnings.*

The inhabitants of the little settlements along the several branches of the Piscataqua learned their first political lessons from Massachusetts, under whose jurisdiction they spent thirty-eight years at the very beginning of their governmental career.<sup>1</sup> The laws, customs and institutions of Massachusetts were quickly adopted in New Hampshire, and the two colonies soon became one in sympathy and in governmental policy.

On September 18, 1679, Charles II issued a commission<sup>2</sup> which separated the two colonies and erected, what Douglass calls the "insignificant colony"<sup>3</sup> of New Hampshire, into a distinct province with a separate President and Council. This change went into effect January 1, 1680, at which date the history of the Council of New Hampshire properly begins.<sup>4</sup>

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<sup>1</sup> By virtue of an instrument signed by five inhabitants of these settlements on April 14, 1641, the people of New Hampshire came to enjoy the same liberties and administration of justice as those of Massachusetts. (*New Hampshire Provincial Papers*, I, 156-9; Farmer's Belknap's *Hist. of N. H.*, 30; Hubbard, 372). The government of this section had previously consisted of four distinct voluntary associations, which were liable to be further subdivided over the disagreements that are inevitable in political affairs.

<sup>2</sup> *Prov. Papers*, I, 373; Poore's *Charters and Constitutions*, II, 1275.

<sup>3</sup> *Summary of America*, II, 34.

<sup>4</sup> During the union with Massachusetts, New Hampshire was entitled to only two Deputies, no mention being made of any representation in the Council. See *Prov. Papers*, I, 159; Farmer's Belknap, 31; Savage's Winthrop, II, 92.

Several changes were made in the government of the colony previous to the outbreak of the Revolution,<sup>1</sup> yet the history of the Council, with one slight exception,<sup>2</sup> extends throughout this entire period of ninety-five years.

Its members were never chosen by the people in their annual elections, as was the case in the neighboring colonies, but were appointed by the Crown.<sup>3</sup> They cannot, therefore, be said to have constituted an independent body at any time in the colonial period. They were always selected from the colony as a whole, without regard to the interests of the different sections,<sup>4</sup> and could be dismissed by the President at his discretion.<sup>5</sup>

During the entire colonial period the powers of this body were threefold—executive, judicial and legislative. The extent of its effective authority, however, was greatly modified by such arbitrary rulers as Cranfield, Barefoot and Andros.

### *Section II.—The Executive Function.*

The Council had no executive powers independent of the Governor, or in his absence of the Lieutenant Governor, both

<sup>1</sup> It remained a separate royal province from 1680 to 1686, when it became a province of New England. Upon the overthrow of Andros in 1690 it again united with Massachusetts. This union lasted until 1692, when it again became a separate royal province. In 1699 another change was made by which it was partially united with Massachusetts, each colony having the same Governor, but different Lieutenant Governors, Councils and Assembly of Representatives. In 1741 it became a separate royal province for the third time and remained as such until 1775.

<sup>2</sup> The second union with Massachusetts (1690–92) was made on the same basis as the first. Hence New Hampshire had no representation in the Council. See *supra*. Cf. *Prov. Papers*, I, 156–9, with *Ibid.*, II, 35–6.

<sup>3</sup> In Cutts' Commission, six out of the ten Counsellors were appointed by the King. (*N. H. Hist. Coll.*, VIII, 2; *Prov. Papers*, I, 375; Poore, II, 1275). In subsequent commissions the King retained the power to appoint all Counsellors except when the number fell below seven at any one time. (*Prov. Papers*, I, 435; II, 58, 306, 367–8, and VI, 909–10).

<sup>4</sup> This finally became a source of complaint on the part of the representatives.

<sup>5</sup> In Cranfield's Commission those who had been thus dismissed were ineligible to a seat in the Assembly. (*Prov. Papers*, I, 435).

of whom were *ex officio* members of it when acting in such a capacity.<sup>1</sup> Its executive sessions were held so often at Portsmouth,<sup>2</sup> at or near which a majority generally resided, that it finally came to be the only recognized place of meeting.<sup>3</sup> The Governor and Council could convene the legislative assembly;<sup>4</sup> advise as to the issuing of warrants for the disposal of public monies;<sup>5</sup> build and fortify, or demolish forts, castles, cities,<sup>6</sup> etc.; supervise the trade and commerce of the colony, order fairs, markets, ports, harbors, etc.; and appoint custom-house and warehouse officials.<sup>7</sup> They were also charged with the granting of lands and tenures,<sup>8</sup> and the establishment of courts of justice.<sup>9</sup> The last named power, though granted by the various royal commissions, seems to have been shared from an early date by the popular branch of the legislature regardless of the united opposition of the Governors and the Councils. The point was not finally conceded until 1771, when the Crown gave the Representatives a legal basis for such action.<sup>10</sup>

<sup>1</sup> *Prov. Papers*, I, 370-6, 440-1; II, 63, etc.

<sup>2</sup> *Ibid.*, II.

<sup>3</sup> *Ibid.*, VII, 204.

<sup>4</sup> *Ibid.*, I, 379, 436; II, 58, 306, 367; VI, 910; VII, 124.

<sup>5</sup> *Ibid.*, I, 440; II, 65, 310, 373; VI, 912; VII, 124.

<sup>6</sup> *Ibid.*, I, 439; II, 60, 308, 371; VI, 911-2; VII, 124.

<sup>7</sup> *Ibid.*, I, 440; II, 61, 67, 311, 373; VI, 913; VII, 124.

<sup>8</sup> *Ibid.*, II, 310, 373; VI, 913; VII, 124.

<sup>9</sup> *Prov. Papers*, II, 59, 307, 369; VI, 911; VII, 124. This power was not granted in Cutts' Commission, since the Governor and Council themselves constituted the Court.

<sup>10</sup> The first contest over the exercise of this power arose in Cranfield's administration. The wording of his commission was very vague on this point. It reads: "We [the King] do hereby give and grant unto you [Cranfield] full power and authority to erect, constitute and establish such and so many courts of judicature and public justice . . . as you and they shall think fit and necessary." (*Prov. Papers*, I, 437.) In the copy of this commission which was delivered to the Assembly the words, "and they" were omitted by order of the Governor who maintained that they were "put in by mistake." The Assembly, of course, thought that it referred to them (*Ibid.*, 517) and demanded a voice in this matter. In the administration of Cranfield and his immediate successors, the power of the Assembly was reduced to the minimum, but after the iniquitous rule of Andros, a

*Section III.—The Judicial Function.*

Upon the organization of the judicial system of New Hampshire after its separation from Massachusetts in 1680, the judicial business of the colony was placed for the most part into the hands of the Counsellors.

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voice in the establishment of courts of judicature was accorded the popular branch, notwithstanding the commissions, which bestowed this entire power upon the Governor and Council. Such authority was not exercised, however, without encountering the opposition of the Council, whose rights were thus infringed upon.

In 1767 the House passed two different bills for the establishment of courts in the various counties to be created by the legislature. (*Prov. Papers*, VII, 135, 140). Both bills were rejected by the Council on the ground that such an act would be an infringement upon the prerogative of the Crown, who had vested this power in the Governor with the advice and consent of his Council. (*Ibid.*, 144). The House replied that the paragraph cited from the Governor's commission had been inserted in the first commission for erecting a government in the province and "from the exigency of affairs was then absolutely necessary till a Legal Establishment of Courts of Justice should take place; and though perhaps the same paragraph" had been inserted in all subsequent commissions, such a power had never been exercised by any Governor of the province "since the laws now in force were passed for holding said Courts in the town of Portsmouth and regulating their proceedings. In the year 1730 three of the Inferior Courts were removed from Portsmouth, one to Exeter, one to Dover, one to Hampton, and but one held at Portsmouth, but this was by an act passed for that purpose. . . . Since the year 1730 four or five Acts of Assembly have been passed for altering the times of the sitting of Courts in this Province, and we think it to be plain that the words Erect, Constitute and Establish have here an original signification of fixing those courts in the first instance." (*Ibid.*, 154-5). The Council still non-concurred. (*Ibid.*, 156, 162). The House appealed to the King (*Ibid.*, 184), who consented that the act should be passed provided it "contained a suspended clause that should not take effect till his Majesty's Pleasure should be known." (*Ibid.*, 202). Thus the point at issue was settled. The act which recognized the rights of the House to a voice in the establishment of courts of justice was passed in April, 1767 (*Ibid.*, 229), and received the royal approval in 1771. (*Ibid.*, 274, 276).



They not only exercised judicial authority in the General Court<sup>1</sup> as in Massachusetts, but were also constituted by the commission of President Cutts, a separate court of appeals for the whole colony. The exercise of this latter power encountered the constantly increasing opposition of the colonists from time to time. It was nevertheless renewed by subsequent commissions and instructions, and was thus continued throughout the colonial period.<sup>2</sup>

Three inferior courts were appointed for Dover, Hampton and Portsmouth. These were held "by y<sup>e</sup> Presid<sup>t</sup> and Counc<sup>l</sup>, or any 6 of y<sup>e</sup> Counc<sup>l</sup> whereof y<sup>e</sup> Presid<sup>t</sup> or his Deputy" were one "together w<sup>th</sup> a Jury of 12 honest men . . . for such as desire to be tried by a Jury."<sup>3</sup> There was no limit to the jurisdiction of these courts. Appeals could be taken to the King in Council on all civil cases involving over fifty pounds<sup>4</sup> and in "criminall cases, where y<sup>e</sup> punishm<sup>t</sup> to be inflicted" extended "to loss of life or limb," except in "y<sup>e</sup> case of willfull murder." The individual members of the Council were also given authority to hear and determine minor offenses.<sup>5</sup>

<sup>1</sup> Farmer's Belknap, 222; *Prov. Papers*, I, 395. As in the other colonies, the General Assembly was usually considered the supreme tribunal for the trial of all cases of appeal from inferior courts. (*Prov. Papers*, VII, 395, *N. H. Hist. Coll.*, VIII, 22.) In Gov. Allen's instructions, however, the exercise of such power was not allowed, since appeals from the Governor and Council were expressly forbidden (*Prov. Papers*, II, 68).

<sup>2</sup>*N. H. Hist. Coll.*, VIII, 4.

<sup>3</sup>*Prov. Papers*, I, 395.

<sup>4</sup>*Prov. Papers*, I, 377; *N. H. Hist. Coll.*, VIII, 4.

<sup>5</sup>*Prov. Papers*, I, 387, 390, 392; *N. H. Hist. Coll.*, VIII, 14, 17, 19. Under the administration of Gov. Dudley New Hampshire became a county of the Province of New England and its courts were composed of Justices of the Peace and such Counsellors as might be present, one at least being required to form such a tribunal (*Prov. Papers*, I, 594). The President and Council of New England, part of which was chosen from New Hampshire, constituted the Superior Courts of Grand Assize and General Goal Delivery which held annual sessions in Boston (*Ibid.*, 595).

Andros and his Council constituted a Court of Sessions and a Superior Court of Judicature (*Ibid.*, II, 16 and 17 note; *Col. Rec. of Conn.*, III, 1678-1689), whose jurisdiction extended over New Hampshire.

The Council minutes show that in the administration of John Usher "all of y<sup>e</sup> Council" had "power as Justice of Peace in y<sup>e</sup> whole Province."

This system was in force until 1699 when the judiciary of the Colony was reorganized. Before that date, however, the courts varied greatly in character, composition and authority. At times, law and justice became "synonymous with a dictator's decrees" and Counsellors, Judges and Assemblies were dismissed with or without cause, as the Governor's prejudice determined.<sup>1</sup>

An act of 1699 shows a marked tendency to reduce the judicial duties of the Council as a body, since by it the Governor and Council were made a court of appeal only for civil cases involving over one hundred pounds.<sup>2</sup> In less than two years afterwards, the colonists made an emphatic assertion of their opposition to this tribunal. Several complaints were sent to the Queen to the effect that the Governor and Council received appeals and decided cases without taking an oath to do justice.<sup>3</sup> An oath was then prescribed and taken,<sup>4</sup> but the people were still unwilling that the Council should exercise judicial as well as executive and legislative power.<sup>5</sup> On January 3, 1727-8, they passed a vote "prohibiting the Sup<sup>r</sup> Court of Judicature" from granting "appeals to the Gov<sup>r</sup> & Council."<sup>6</sup> The Council non-concurred and cited the royal instructions as the source of its judicial authority.<sup>7</sup> Lieutenant Governor Wentworth put an end to the controversy by dissolving the Assembly.<sup>8</sup> But this did not silence the opposition

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<sup>1</sup> Sanborn's *Hist. of N. H.*, 81.

<sup>2</sup> *Prov. Papers*, III, 86 and 220. Membership in the Council did not, however, disqualify one from exercising other judicial powers besides those pertaining to the Council as a whole.

<sup>3</sup> Farmer's Belknap, 222.

<sup>4</sup> *Prov. Papers*, II, 342.

<sup>5</sup> This opposition was occasioned partly because the judges who decided cases in the inferior courts were members of the Council; "partly because no jury was admitted in this court of appeal; and partly because no such institution was known in the neighboring province of Massachusetts." (Farmer's Belknap, 222).

<sup>6</sup> *Prov. Papers*, IV, 475.

<sup>7</sup> It even characterized this act as a "scandalous libel" (*Prov. Papers*, III, 480).

<sup>8</sup> *Ibid.*, 484.

of the people, and the existence of this tribunal was a standing grievance throughout the rest of the colonial era.<sup>1</sup>

#### *Section IV.—The Legislative Function.*

All the royal commissions issued to the Governor of New Hampshire vested the legislative power in the General Assembly of Representatives.<sup>2</sup> All the Governors except Cutts were given a veto over all the acts of the legislature.<sup>3</sup> All enactments passed by both houses and approved by the Governor were transmitted to the Privy Council in England and remained in force until disallowed by that authority.<sup>4</sup>

The first session of the General Assembly of New Hampshire met at Portsmouth on March 16, 1679–80. Profiting by the unpleasant experiences of Massachusetts, three years after they had first passed under her jurisdiction, the two branches of the Assembly sat apart<sup>5</sup> and it was enacted that "no Act, Imposition, Law or Ordinance be made or imposed upon" the province "but such as shall be made by the said Assembly and approved by the Presid<sup>t</sup> and Council from time to time."<sup>6</sup> They then proceeded to re-enact the laws of Massachusetts under which they had lived so agreeably for thirty-eight years.<sup>7</sup>

<sup>1</sup> In 1772 complaint was made to the Lords of Trade that the Governor and Council had deprived grantees under the crown of their lands "without any legal process" or a trial by jury (Belknap, ed. 1812, III, Appendix; Farmer's Belknap, 345; *Prov. Papers*, VII, 338).

<sup>2</sup> *Prov. Papers*, II, 59, 307, 369; VI, 910; VII, 124.

<sup>3</sup> Belknap (Farmer's Edition, 97) says that Cranfield was the first to whom such power was granted in New England.

<sup>4</sup> Palfrey, II, 267.

<sup>5</sup> See Prof. T. F. Moran's *Rise and Development of the Bicameral System in America*, J. H. U. Studies, Thirteenth Series, V, 13–16; Belknap's *Hist. of N. H.*, I, 178–9.

<sup>6</sup> *Prov. Papers*, I, 382–3; *N. H. Hist. Coll.*, VIII, 10.

<sup>7</sup> Sanborn's *Hist. of N. H.*, 78–9.

President Cutts died in 1681 and was succeeded on the following year by Edward Cranfield. Owing to Cranfield's unpopularity, in less than four months after his arrival in the colony, three members of the Council had voluntarily withdrawn and three others had been dismissed.<sup>1</sup> On account of a disagreement, the Assembly was dissolved by Cranfield, January 20th, 1683.<sup>2</sup> The Governor and Council then assumed the entire legislative authority,<sup>3</sup> which they retained until forced by need of money to summon a new Assembly.<sup>4</sup> At this session of the Assembly which convened January 14, 1684, we find the first assertion in New Hampshire of a prerogative which was claimed sooner or later by the lower house in all the colonies, except perhaps Rhode Island.<sup>5</sup> The Representatives rejected as "unparliamentary," a money bill which had been previously passed by the Council.<sup>6</sup> The Governor dissolved the Assembly on the following day,<sup>7</sup> and attempted to levy taxes upon his own authority.<sup>8</sup> Failing in this, he summoned a third Assembly six months later.<sup>9</sup> This Assembly also exhibited a spirit of insubordination to his demands and was likewise dismissed after a short session. From this time the right to originate money bills was never relinquished by the popular branch of the Assembly.

After the unsettled period,<sup>10</sup> immediately following the imprisonment of Andros<sup>11</sup> in 1689, Samuel Allen was appointed Governor and John Usher Lieutenant Governor of the colony. The commission<sup>12</sup> and instructions<sup>13</sup> of Governor Allen, which

<sup>1</sup> Farmer's Belknap, 98. Two of the latter were afterwards restored.

<sup>2</sup> *Ibid.* <sup>3</sup> *Prov. Papers*, I, 518.

<sup>4</sup> Farmer's Belknap, 104.

<sup>5</sup> See *infra*.

<sup>6</sup> Farmer's Belknap, 104.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*, 110.

<sup>9</sup> *Ibid.*

<sup>10</sup> From the surrender of Andros' government, April 18, 1689 (*Prov. Papers*, II, pt. I, p. 21), until the accession of Governor Allen, there was no legalized government in the colony. (*Ibid.*, 30 *et seq.*).

<sup>11</sup> During his administration there was no popular branch of the Legislature. Laws were made by the Governor and his Council of fifteen, only one of whom was from New Hampshire. (*Ibid.*, 118-9).

<sup>12</sup> *Ibid.*, 57.

<sup>13</sup> *Ibid.*, 63.



were issued March, 1692, constituted a frame of government, the Legislature of which was substantially the same as that provided for in the commission of President Cutts. In fact no important change was made in the legislative power of the Council throughout the rest of the colonial period.

The Assembly was held under the strict surveillance of the royal officers, and was kept too severely in check to admit of that expansion which was necessary in order to keep apace with the advancing ideas of the people. Not only was the Council at the mercy of the royal Governor, but the popular branch was held largely within the limits of his desires by his veto power and his authority to prorogue its sessions. Above them all stood the King who retained "the prerogative of disannulling the acts of the whole at his pleasure."

The last session of the General Assembly under the government of Great Britain was held July 18, 1775.<sup>1</sup> Previous to this date the government of the colony had been gradually assumed by representatives of the people who formed themselves into a Provincial Congress.<sup>2</sup> This peculiar form of government continued until January 5, 1776, when, according to the last vote of the Fifth Provincial Congress, it was decided to "take up Civil Government."<sup>3</sup>

#### *Section V.—The Constitution of 1776.*

This body then tried its skill at constitution-making. It first metamorphosed itself into a popular branch of the Legislature by assuming "the Name, Power & Authority of a

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<sup>1</sup> *Prov. Papers*, VII, 385.

<sup>2</sup> Under this form of government the entire political authority of the people was delegated to a body of men who exercised executive as well as legislative power. During the recesses of this body their power was exercised by a "Committee of Safety," whose acts were as binding as those of the entire Congress.

<sup>3</sup> *Prov. Papers*, VIII, 2.

house of Representatives or Assembly for the Colony<sup>1</sup> of New Hampshire,"<sup>2</sup> and then proceeded to create a new Council to take the place of the old one which had disappeared with the royal government. This Council, like its predecessor, constituted "a Distinct and Separate Branch of the Legislature."<sup>3</sup> It resembled the old Council in size and character of membership,<sup>4</sup> but differed from it in two respects. The new Counsellors were chosen by popular election after the expiration of the term of the first, who were appointed by the House; and they were apportioned among the different counties of the colony,<sup>5</sup> five being from Rockingham, two from Stafford, two from Hillsborough, two from Cheshire and one from Grafton County.<sup>6</sup>

This constitution did not confer any judicial authority upon the Council, as a body, independent of the Assembly; and on January 26, 1776, "All clauses" of the colonial laws "Respecting the Governor & Council Sitting or acting as a Court of Appeals" were repealed,<sup>7</sup> and the supreme judicial power was assumed by the legislature.<sup>8</sup> This act abolished the tribunal which the colonists had considered a grievance for several

<sup>1</sup> The title of "State" was not assumed until September 10, 1776. (*Prov. Papers*, VIII, 332).

<sup>2</sup> *Prov. Papers*, VIII, 3; *N. H. Hist. Coll.*, IV, 151-2.

<sup>3</sup> *Ibid.*

<sup>4</sup> September 19, 1776, provision was made for adding to the membership of both branches of the Legislature upon the accession of new towns or settlements. (*Prov. Papers*, VIII, 344; *N. H. Hist. Coll.*, IV, 154).

<sup>5</sup> *Prov. Papers*, VIII, 3, 4; *N. H. Hist. Coll.*, IV, 153.

<sup>6</sup> *Prov. Papers*, VIII, 3, 6. As early as 1717 the choice of Counsellors from one locality (Portsmouth) had been made a cause for complaint on the part of the Assembly. We are told that at that time "ye whole number" of counsellors resided "w<sup>th</sup>in two miles or therea<sup>bt</sup> one of another." (*Prov. Papers*, III, 675). For this reason the Representatives very properly claimed at a later date, that they were better acquainted with the needs and desires of the people than were the Counsellors. (*Prov. Papers*, VII, 203-4).

<sup>7</sup> *Prov. Papers*, VIII, 60.

<sup>8</sup> A very strong plea against such an exercise of power was presented in the case of the *State vs. Porter*. (*Prov. Papers*, VIII, 327-8).

years.<sup>1</sup> With its enforcement the Council as a body ceased to exercise judicial powers, but its members still served in an *ex officio* judicial capacity as individuals.<sup>2</sup>

One of the greatest defects of the hastily formed Constitution of 1776 was the want of an executive branch of government. To remedy this the two houses "of Legislature during their session performed executive as well as legislative duty," and at every adjournment a Committee of Safety was appointed to transact the business of the colony "in the recess of the General Assembly."<sup>3</sup> The appointment of "all civil officers for the Colony & for Each County," "Except Clerks of Courts & County Treasurers & Recorders of Deeds" was vested in both houses of the Legislature.<sup>4</sup> They also appointed the higher military officers who had been previously appointed by the royal Governors.<sup>5</sup>

No changes were made in the legislative powers of the Council. All acts and resolves "agreed to and passed by both Branches of the Legislature" had the force of law<sup>6</sup> and all "Bills, Resolves or votes for Raising, Levying & Collecting

<sup>1</sup> See *supra*.

<sup>2</sup> On January 12, 1776, it was voted "That the members of the Hon<sup>ble</sup> Council . . . be Justices of the Peace and of the Quorum throughout" the colony. (*Prov. Papers*, VIII, 18). They were also permitted to fill any other judicial office to which they might be chosen, since membership in the Council did not disqualify them for such positions. (Farmer's Belknap, 364).

<sup>3</sup> *Prov. Papers*, VIII, 21. The orders and recommendations of this committee had the same effect as the acts and resolves of the Council and House while in session. (*N. H. Hist. Coll.*, II, 38, note). The committeemen were chosen by the Legislature and varied in number from six to sixteen. The President of the Council was also President of the Executive Committee. (Farmer's Belknap, 364).

<sup>4</sup> *Prov. Papers*, VIII, 4; *N. H. Hist. Coll.*, IV, 153.

<sup>5</sup> *Prov. Papers*, VIII, 3, 4; *N. H. Hist. Coll.*, IV, 153.

<sup>6</sup> *Prov. Papers*, VIII, 3; *N. H. Hist. Coll.*, IV, 152. This rule had been observed ever since the meeting of the first General Assembly of the colony in 1679-80.

money" were still required to "Originate in the House of Representatives."<sup>1</sup>

*Section VI.—The Proposed Constitution of 1779.<sup>2</sup>*

This instrument proposed the following changes: (1) That the Governor with the advice of the Council be authorized to grant reprieves,<sup>3</sup> to call extra sessions of the General Court, and to point out the principal business of such sessions.<sup>4</sup> (2) That the members of the Council be disqualified from holding the office of Sheriff.<sup>5</sup> (3) That no member of the General Court should be judge of the Superior, the Inferior, or the Probate Court.<sup>6</sup> The significance of this constitution is the fact that it marks a tendency towards a separation of the functions of government.

*Section VII.—The Proposed Constitution of 1781.<sup>7</sup>*

This constitution marks another step in the development of the ideas of the people towards a separation of the functions of government which was so vaguely indicated by the proposed constitution of 1779. The executive power of the state was to be vested in the Governor and a new body to be known as the "Privy Council."<sup>8</sup> The former Council of twelve was to be continued under the title of "Senate," and its powers were to be restricted to the legislative function alone.<sup>9</sup>

<sup>1</sup> *Prov. Papers*, VIII, 3; *N. H. Hist. Coll.*, IV, 152. This power had also been exercised by the House, throughout the history of the colony.

<sup>2</sup> Although it was rejected by the people in their town meetings on account of its imperfections, the principal one of which was the omission of a provision for the chief executive, it nevertheless indicates certain advances in the ideas of the people as to the duties of the Council. A copy of this Constitution is given in *N. H. Hist. Coll.*, IV, 154, *et seq.*

<sup>3</sup> *N. H. Hist. Coll.*, IV, 160. <sup>4</sup> *Ibid.*, 159. <sup>5</sup> *Ibid.*, 160. <sup>6</sup> *Ibid.*

<sup>7</sup> This constitution is not given in the *N. H. Hist. Coll.*, but the Address accompanying it which discussed its main features may be found in *Ibid.*, IV, 162-73.

<sup>8</sup> *N. H. Hist. Coll.*, IV, 170.

<sup>9</sup> *Ibid.*, 166; Farmer's Belknap, 383.



*Section VIII.—The Constitution of 1783–4.*<sup>1</sup>

The adoption of the second state constitution marks the final step in the evolution of the Senate in New Hampshire.

It declared that “the three essential powers” of government “ought to be kept as separate from and independent of each other as the nature of a free government will admit.”<sup>2</sup>

The executive power was vested in the President of the state and his Council of five—two Senators and three Representatives—who were chosen annually by a joint ballot of both houses.<sup>3</sup>

The judicial power was exercised by officers chosen by the President and his newly created Council.<sup>4</sup>

The supreme legislative power was vested in a General Court composed of a Senate and a House of Representatives, each of which had “a negative on the other.”<sup>5</sup> The Senate was an exact counterpart of the Council under the first constitution. It consisted of twelve persons,<sup>6</sup> seven of whom were necessary to constitute a quorum. Its members were to be elected by districts; but, until otherwise ordered by the General Court, the different counties were to elect each the

<sup>1</sup>A copy of this constitution is given in *N. H. State Papers*, XX, 9–30, and in Poore, II, 1280, *et seq.* The convention that drew up the constitution of 1781 continued its labors for a period of more than two years (June, 1781 to October, 1783), and held no less than nine sessions. The result of their prolonged labors is the constitution which was adopted June 2, 1784.

<sup>2</sup>Bill of Rights, Art. XXXVII. The incorporation of this principle was probably due to the able arguments in the case cited above (p. 49, note 8) and to the influence of other state constitutions which embodied this feature—particularly that of Massachusetts, “which was supposed to be an improvement on all which had been framed in America.” (Farmer’s Belknap, 383.)

<sup>3</sup>*State Papers*, XX, 24; Poore, II, 1289.

<sup>4</sup>*State Papers*, XX, 23; Poore, II, 1288.

<sup>5</sup>*State Papers*, XX, 15; Poore, II, 1284.

<sup>6</sup>Presided over by the President of the State who had a vote “equal with any other member,” and also “a casting vote in case of a tie.”

same number of Senators that had been granted them by the constitution of 1776.<sup>1</sup> The House still retained the power to originate money bills, but the Senate had power to "propose or concur with amendments as on other bills."<sup>2</sup> The only remnant of judicial power left the Senate was the trial of impeachments made by the House of Representatives,<sup>3</sup> as was the case in most other states.

Senators were required to belong to the Protestant faith ; to be possessed of a freehold estate of two hundred pounds within the State ; to be at least thirty years of age, inhabitants of the state seven years, and, at the time of their election, inhabitants of the district from which they were chosen.<sup>4</sup>

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<sup>1</sup> Cf. *Prov. Papers*, VIII, 3, with *State Papers*, XX, 16 ; Poore, II, 1285.

<sup>2</sup> *State Papers*, XX, 20 ; Poore, II, 1287.

<sup>3</sup> *State Papers*, XX, 18 ; Poore, II, 1286.

<sup>4</sup> *Ibid.*

## CHAPTER IV.

### RHODE ISLAND.

#### *Section I.—Governmental Beginnings.*

The first settlers of this state founded not a single colony, but four separate and distinct settlements; namely, Providence in 1636, Portsmouth in 1638, Newport in 1639, and Warwick in 1642.

These towns were at first independent, self-centred communities of persons who differed no less in governmental ideas<sup>1</sup> than in religious faith. There seems to have been, however, a

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<sup>1</sup>In 1637, thirteen of the settlers of Providence signed a civil compact in which they agreed to be governed "by the maior consent of the . . . inhabitants maisters of families Incorporated Together into a towne fellowship and others whome they" should "admit unto them" "only in civill things." (*Early Rec. of the Town of Prov.*, I, 1; *R. I. Col. Rec.*, I, 14.) Town meetings of all the inhabitants were held monthly down to 1640, when the growth of the colony rendered a purely democratic government impracticable. (Mr. W. E. Foster's *Town Government in Rhode Island*, J. H. U. Studies, Fourth Series, II, p. 13, 16, 19; Arnold's *Hist. of the State of Rhode Island*, I, 102.) "The general business of the town" with a few exceptions, was then delegated to "5 Disposers" who held monthly meetings. They were chosen by the town meetings in which all the freemen henceforth assembled quarterly. (*R. I. Col. Rec.*, I, 108-9; *Historical Discourse* by Hon. Thomas Durfee in 250th Anniversary of Providence, 127.)

The Portsmouth settlers inclined to a sort of theocracy. Following Judaic example, they chose a Judge "to exercise authority among them." (*R. I. Col. Rec.*, I, 52.) Within a year three elders were associated with him and to them all was given "the whole care and charge of all the affairs" of the colony. They were to administer justice and to draw up such rules and laws as should be for the general welfare and "according to God." In 1639, the people discarded the theocratic element to a great extent and

direct line of institutional development from germs that appeared at the foundation of the two island governments, which later united, and not only took the initial step towards a union of all the settlements,<sup>1</sup> but furnished a model for the government of the whole colony.<sup>2</sup> By a rapid series of developments the Judges in the separate towns of Portsmouth and Newport

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constituted themselves into "a civill body politicke." (*Ibid.*, 70.) The offices of Judge and Elders were continued and the number of the latter was increased to seven. Their duties as a body seem to have been confined principally to the judicial function, and a jury system was introduced. (*Ibid.*)

The government of Newport was a counterpart of that of Portsmouth, from which it sprang, and with which it was finally united. It also had Judges and Elders (*Ibid.*, 87) who served chiefly in a judicial capacity (*Ibid.*, 90, 93), though they were granted some executive power. (*Ibid.*, 95). In legislative power they do not seem to have been superior to other freemen who attended the General Quarter Courts.

In 1640 Portsmouth and Newport united in a common government. (*Ibid.*, 100). The titles of "Judge" and "Elder" were then abolished by the General Court and those of "Governor" and "Assistant" substituted in their stead. Provision was made for the election of a Governor, a Deputy Governor and four Assistants, the Governor and two Assistants to be chosen in one town and the Deputy and two other Assistants in the other town. (*Ibid.*, 101). They were "invested with the offices of Justices of the Peace" *ex officio*. At the next "General Courte," "particular Courts" consisting of "Magistrates (Assistants) and Jurors" were established to be held each month at Newport and Portsmouth alternately for the trial of "all such cases and actions as shall be presented." (*Ibid.*, 103). Three months later the Magistrates of each town were constituted a tribunal for the trial of all cases, matters of life and death only excepted, that might arise in their respective towns.

The settlers at Warwick, under the influence of Gorton, maintained that they had no legal right to erect a government without being authorized to do so by the mother country. (*Ibid.*, 129). They therefore remained without any form of government until the organization of the colonial government in 1647.

<sup>1</sup> *R. I. Col. Rec.*, I, 125; Arnold, I, 113.

<sup>2</sup> Providence instructed its commissioners who attended the first meeting of the towns under the charter of 1663-4 "to hold correspondency with the whole in that model that hath been lately shown unto us by our worthy friends of the Island." (*R. I. Col. Rec.*, I, 43; Staples' *Annals*, R. I. Hist. Soc. Coll., Vol. V, 62).



were succeeded by the Governor of the united government of the island, and then the President of the whole colony under the first charter.<sup>1</sup> The Elders at the same time and by a similar course of evolution became the Magistrates or Assistants of the island and then of the united colony.<sup>2</sup> The history of their development into a Senate is unique. They came into existence as a purely executive and judicial body, but later acquired legislative power without losing their authority in the other branches of government. They finally lost their executive and judicial functions, but retained legislative power, and thus became a true Senate.

On March 14, 1643-4, the English Parliamentary Commission granted a charter or patent<sup>3</sup> to Providence, Newport and Portsmouth<sup>4</sup> under the name of the Providence Plantations.<sup>5</sup>

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<sup>1</sup> This charter was formed upon the Massachusetts model, with an additional feature which provided for a representative system, similar to that which had grown up in Massachusetts. All the New England colonies were assimilated to the same model.

<sup>2</sup> See *supra*.

<sup>3</sup> There seems to be no ground for the distinction between a charter and a patent as given in Jameson's *Dictionary of American History*, p. 124. That grants to individuals were not always called patents is evident from the wording of the instruments granted to Lord Baltimore (Poore's *Charters and Constitutions*, I, 811-17) and to William Penn (*Ibid.*, II, 1509-15). On the other hand the words, "charter" and "patent," seem to have been indiscriminately used to designate grants both to corporations and to individuals. See *R. I. Col. Rec.*, II, 143-6; *Conn. Col. Rec.*, I, 384. In fact, no distinctions seem to have been made, by the colonists at least, in the use of these terms. Penn referred to his "charter" of 1681 as "Letters Patent." (Poore's *Charters and Constitutions*, II, 1536). See also Jacob's *Law Dictionary* (London, 1809) under titles "Charters of Private Persons," "Grants of the King" and "Patents," and Black's *Law Dic.*, pp. 196, 877.

<sup>4</sup> Although Warwick was not mentioned in the charter, it united with the other towns at the organization of the government of the colony.

<sup>5</sup> A copy of this charter may be found in *R. I. Col. Rec.*, I, 143-6; *Coll. of R. I. Hist. Soc.*, IV, 221-5; and Poore's *Charters and Constitutions*, II, 1594-5. An excellent account of the "Origin of the Charter Government and Its Fundamental Principles" may be found in Burke's Report on "*Rhode Island—Interference of the Executive in the affairs of*," (Pub. Doc., 28th Congress, 1st Session. House Representatives Report No. 546) 6-8.

It prescribed no form of government nor mode of organization. In fact, it still left the towns independent of each other and was calculated to produce a confederation (*Staatenbund*) rather than a union (*Bundestaat*).<sup>1</sup>

After the lapse of more than three years from the granting of the charter, the first General Assembly of the colony met at Portsmouth. The charter was then formally adopted and the government systematically organized. The executive and judicial powers were largely vested in a President and four Assistants,<sup>2</sup> the latter of whom were annually elected by the freemen of the several towns. A novel method of making laws was then devised, by which the legislative power was made to reside ultimately in the people.<sup>3</sup> This cumbersome

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<sup>1</sup> Staples' *Annals*, 68; Arnold's *Hist. of R. I.*, I, 285. The charter granted the inhabitants "full Power and Authority to rule themselves" "by such a Form of Civil Government as by voluntary consent of all or the greater Part of them, they shall find most suitable to their Estate and Condition." (*R. I. Col. Rec.*, I, 145).

<sup>2</sup> Chalmers' *Annals*, 273. They were given power "to arrest and bail out or imprison all disturbers of the peace" (*R. I. Col. Rec.*, I, 192-3); and under certain circumstances, to issue summons (*Ibid.*, 340-1), grant commissions (*Ibid.*, 347), and call special sessions of the General Assembly (*Ibid.*, 276).

As a judicial tribunal they were granted power "to hold semi-annually the General Court of Tryall for the whole Colonie." (*Ibid.*, 191, 194-5.) "This court was held semi-annually and its jurisdiction extended over all matters of greater weight," such as the higher class of crimes, cases between town and town, between citizens and strangers; and in general, to all matters "not referred to other tribunals." (Durfee's *Gleanings from the Judicial Hist. of R. I.*, 7, 8, Pub. in *R. I. Hist. Tracts*, No. 18.) In 1651, this tribunal was "converted into a court of appeal or review." (*Ibid.*)

They were also made "conservators of the peace in the Towne where they live and throwout the whole Colony" (*R. I. Col. Rec.*, I, 192), and were authorized to act as Coroner in each town where they dwelt. (*Ibid.*, 195.)

<sup>3</sup> Any town of the colony could take the initiative in legislation. When a town desired the enactment of a law which concerned the whole colony, the bill was drawn up, discussed and voted upon in the town-meeting. If it was favorably considered by this meeting, a copy of the proposed law was sent to the other towns for similar consideration. A report of the actions of all the towns was then 'commended' to the "Committee for the

method, however, was forsaken after a brief trial and the legislative power came to be largely exercised by a "Committee" of six from each of the towns.

The second charter, which was granted in 1663, marks the entrance of the Assistants upon the legislative domain. It vested the government of the colony in a Governor, Deputy Governor, ten Assistants,<sup>1</sup> and eighteen Deputies.<sup>2</sup> The

General Courte"—a body composed of six from each town. If it was found that "the major parte of the Colonie" concurred in the bill it was declared "a Law till the next Generall Assembly of all the people" should determine whether or not it should continue longer. In all cases where the Assembly took the initiative in legislation, the bill as passed by that body was referred by the Committee to the different towns, where it was voted on by the people. These votes were sent "by the Towne Clarke of each Towne . . . to the General Recorder," who, in the presence of the President opened and counted them. If a majority of the votes were favorable to the bill it stood "as a law till the next General Assemblie" when it was either confirmed or annulled. (*R. I. Col. Rec.*, I, 148-9; *Staples' Annals*, 65.) The Committee gradually assumed legislative authority under the title of "the Court of Commissioners" until they came to be in fact the General Assembly, although others who desired might sit with them. (*R. I. Col. Rec.*, I, 213, 228, 277; *Arnold*, I, 219.) Having assumed the authority of the General Assembly they then assumed that title. (*Arnold*, I, 230.) A limit was also made to the time when the towns might interpose their objections to acts initiated by the General Assembly, which acts otherwise became laws. (*R. I. Col. Rec.*, I, 229, 401, 429.) The referendum was finally abolished under the second charter (*R. I. Col. Rec.*, II, 26) and in 1672 speaking "against any of the Acts and Orders" of the Assembly "at any time, more especially in any town meeting," etc., was made a crime punishable "at the discretion of the Justices." (*Ibid.*, 439.)

<sup>1</sup>Of the twelve State Officers—two Executives and ten Assistants—five were required to be inhabitants of Newport, three of Providence and two each of Portsmouth and Warwick. (*R. I. Col. Rec.*, II, 33; *Staples' Annals*, 141; *Arnold*, I, 302). This appears to have been the first instance in New England, and probably in any of the colonies, in which the Counsellors were distributed according to geographical location. An act which was passed in Massachusetts in the administration of Governor Phipps (1694), requiring all Deputies to be residents of the district they represented, is often incorrectly cited as the first instance in which this principle was introduced in the American colonies.

<sup>2</sup>Newport was allowed six Deputies and the three remaining towns four each. Towns that might be subsequently added were to be allowed two Deputies each.

Assistants were elected annually and represented the colony as a whole, while the Deputies were elected semi-annually<sup>1</sup> and represented the towns.

*Section II.—The Executive Function.*

This charter granted the Governor or Deputy Governor and Assistants authority over the militia, whenever occasion might arise in a recess of the General Assembly.<sup>2</sup> This proved a very important and timely provision, since ample occasion soon arose for the exercise of such power. Beginning in May, 1667, the Governor and Council,—for such it had become in name<sup>3</sup>—held frequent meetings in the intervals of the General Assembly.<sup>4</sup> This became necessary because of a threatened invasion by the French and Dutch, with whom the mother country was at enmity, and the rapidly developing hostility of the Indians which finally culminated in King Philip's War. Their charter powers were amplified by the General Assembly which authorized them to raise and equip troops; to order their movements; to appoint and commission officers; and in short, to take all necessary steps for defending the colony, if occasion should arise.<sup>5</sup> In the exercise of these duties, their acts were considered equally binding with those of the Assembly.<sup>6</sup> In 1669 they arranged for monthly meetings of the Council,<sup>7</sup> but the condition of affairs rendered it necessary

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<sup>1</sup>The origin of semi-annual elections of Deputies probably dated back to the act of the first General Assembly of the colony (1647) by which the representative system was created. It provided that "a week before any General Courte," which met twice a year, "notice should be given to every Towne by the head officers that they chuse a Committee for the Transaction of the affairs there." (*R. I. Col. Rec.*, I, 147).

<sup>2</sup>*R. I. Col. Rec.*, II, 14; Douglass' *Summary*, II, 85.

<sup>3</sup>Within a year of the granting of the charter, the Assistants, while acting in an executive capacity, assumed the title of "Council." (*R. I. Col. Rec.*, II, 67).

<sup>4</sup>*Ibid.*, 191 *et seq.*

<sup>5</sup>*Ibid.*, 205–8, 212.

<sup>6</sup>Arnold, I, 330.

<sup>7</sup>*R. I. Col. Rec.*, II, 256.



to assemble much more frequently.<sup>1</sup> Their summary dealings with Ninecraft,<sup>2</sup> their effective action in the King's Province dispute,<sup>3</sup> their prompt announcement of the royal proclamations<sup>4</sup> and their power to treat with enemies<sup>5</sup> and to appoint town officers,<sup>6</sup> indicate the nature and extent of their executive authority from time to time. In October, 1708, we find that no war measures at all were taken by the General Assembly.<sup>7</sup> This was probably due to the fact that sufficient power had already been granted the Council to provide for defence against the enemy.<sup>8</sup>

By the outbreak of the Revolutionary War, however, the Council had almost ceased to exercise executive power as a body. The matters which arose in the recess of the Assembly were entrusted to special committees appointed by that body when occasion arose. These committees varied in name<sup>9</sup> and composition<sup>10</sup> from time to time, but their general powers were the same as those that had been previously exercised by the Governor and Council.

### *Section III.—The Judicial Function.*

"The charter," says Judge Durfee, "did not *create* judicial tribunals, but empowered the General Assembly to create them; and accordingly, the General Assembly, at its first session under the charter," turned its attention to a reorganization of the judicial system.<sup>11</sup> The Assistants were given power

<sup>1</sup> Arnold, I, 338.

<sup>2</sup> *R. I. Col. Rec.*, II, 264-6, 269; Arnold, I, 339 *et seq.*

<sup>3</sup> *R. I. Col. Rec.*, II, 256, 298; Arnold, I, 338, 344-6.

<sup>4</sup> *R. I. Col. Rec.*, II, 461-2; Arnold, I, 359.

<sup>5</sup> *R. I. Col. Rec.*, II, 489-90.

<sup>6</sup> *Ibid.*, III, 89.

<sup>7</sup> *Ibid.*, IV, 48 *et seq.*

<sup>8</sup> Arnold, II, 34.

<sup>9</sup> They were called "Committees of Safety," "Recess Committees," and "Councils of War."

<sup>10</sup> *R. I. Col. Rec.*, VII, 327, 365, 383, 543; VIII, 22, 56, 229, 316, 419, 422, 471-2, 545, 616, etc.

<sup>11</sup> *Gleanings, etc.*, 11; *R. I. Col. Rec.*, I, 25 *et seq.*

greater even than they had exercised under the first charter. In fact, they seem to have been granted almost a monopoly of judicial authority, since they not only served in this capacity as individuals,<sup>1</sup> but they also constituted as a body, four of the most important tribunals in the colony.<sup>2</sup>

They were required to hold "a special Court or Courts in Newport for merchants and seamen, or any other," when occasion arose;<sup>3</sup> also semi-annual "Courts of Triall" alternately at Providence and Warwick "for the trial of any actional matter to the value of and under ten pounds, debt or damages."<sup>4</sup> Matters referred to these courts finally passed into the jurisdiction of the county courts upon the division of the colony into counties."<sup>5</sup>

The General Court of Trials as constituted under the first charter was continued under the second, though there was an alteration in its composition and place of meeting. Its membership was confined exclusively to the Governor, Deputy Governor, and at least six Assistants,<sup>6</sup> and its sessions were held semi-annually at Newport.<sup>7</sup> In 1729 its name was changed to "The Superior Court of Judicature, Court of As-

<sup>1</sup> They were *ex officio* members of the town councils (*R. I. Col. Rec.*, II, 27; Douglass' *Summary*, II, 85; Staples' *Annals*, 140, 155, 172) and served as Coroners in the towns where they lived. (*R. I. Col. Rec.*, II, 28).

<sup>2</sup> These were: (1), The special courts for Newport; (2), Two semi-annual courts for Providence and Warwick; (3), The General Courts of Trial; (4), Probate Courts with only an appellate jurisdiction. They also constituted the Court for King's Province until 1669. (*R. I. Col. Rec.*, II, 256).

<sup>3</sup> *R. I. Col. Rec.*, II, 26-7.

<sup>4</sup> *Ibid.*, 31.

<sup>5</sup> For the extent of jurisdiction exercised by the county courts, the justices of the peace, the General Sessions of the Peace and the Inferior Courts of Common Pleas, see Acts and Laws of R. I. from 1745 to 1750, ed. 1752, 77, 110; *R. I. Col. Rec.*, V; Douglass' *Summary*, II, 95-96.

<sup>6</sup> Under the charter of 1643-4 this court was composed at first of the Governor and Assistants, but in May, 1649, the Magistrates of the town where the court assembled for the time, were added to the tribunal. (*R. I. Col. Rec.*, I, 218).

<sup>7</sup> Under the former charter this court was required to be held at the different towns of the colony in succession.

size and General Goal Delivery," and its jurisdiction became more largely appellate in both civil and criminal matters,<sup>1</sup> but its composition and place of meeting,—two of its most radical defects under the second charter,<sup>2</sup>—remained unchanged. But with the increase of litigation consequent upon the increase of population, the Assembly was finally forced to remedy these defects. The change was made in 1747 by an act which required that in lieu of the Governor or Deputy Governor and Assistants, this court should be held by five judges,<sup>3</sup> a chief and four associates who were to be appointed annually by the General Court.<sup>4</sup> Although this act excluded the Assistants from an *ex officio* seat, they were still eligible to judgeships in this tribunal, since the offices were not declared incompatible. The final step in the separation of these two offices was not taken until 1780, when the doctrine of a separation of the functions of government was in the ascendancy in the newly created states of the Union. It was then enacted by the Assembly that, "Whereas it is incompatible with the constitution of this state, for the legislative or judicial and powers of government to be vested in the same persons," "for the future, no member, either of the upper or lower house of Assembly . . . shall exercise the office of a justice of the superior court, within this state, from and after the next election."<sup>5</sup> This principle, once asserted, rapidly gained ground, and in May, 1783, an act was passed excluding all judges of the Court of Common Pleas from the General Assembly.<sup>6</sup> There was not, however, an absolute separation of the judicial and legislative functions until a much later date, since the Senate still exercised appellate jurisdiction in probate matter<sup>7</sup>—a power which

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<sup>1</sup> Douglass' *Summary*, II, 96-7.

<sup>2</sup> Durfee's *Gleanings from the Judicial Hist. of R. I.*, 16-20.

<sup>3</sup> Any three of whom were sufficient to constitute a quorum. (*R. I. Col. Rec.*, V, 226).

<sup>4</sup> Acts and Laws of R. I. from 1745 to 1750, ed. 1752, 27-8. Two sessions of this court were to be held annually in each county of the colony.

<sup>5</sup> *R. I. Col. Rec.*, IX, 32.

<sup>6</sup> *Ibid.*, 690.

<sup>7</sup> Douglass' *Summary*, II, 85, 97.

it had inherited from the Colonial Council.<sup>1</sup> In the early part of the present century, this final remnant of judicial power was transferred from the Senate to the Supreme Judicial Court,<sup>2</sup> and the Senate as a body ceased to exercise *ex officio* judicial authority.<sup>3</sup>

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<sup>1</sup> In 1663 original probate jurisdiction was granted to the town councils from whom appeals could be taken to the Governor and Council as "supreme ordinary or judge of probates."

<sup>2</sup> Arnold (II, 157) says this change occurred in 1802, while Durfee (33) says it occurred in 1822.

<sup>3</sup> The General Assembly, however, not only exercised judicial authority throughout the colonial period, but after the beginning of statehood, it continued to do so in violation of the wholesome principle which had been enacted in 1780 (see *supra*). Under their oaths of office as legislators, the members of the General Assembly assumed the responsibility of judges, and it is difficult at times to decide from the colonial records whether the legislative or the judicial element predominated in its proceedings. In fact, the prudent limitations placed upon the range of its jurisdiction as prescribed by one Assembly were often totally disregarded by another. (Cf. Arnold, I, 448, with *Ibid.*, 459-60). Since it was above the courts it could exercise unlimited authority, and therefore often came in conflict with them. The case of *Mawney vs. Peirce* came up before the Superior Court in 1752, and was decided in favor of the plaintiff. The defendant then appealed to the Assembly as a court with appellate jurisdiction. A new trial was granted before the Assembly, and a verdict was rendered which "over-ruled the decision of the highest actual judicial authority in the colony." (*R. I. Col. Rec.*, V, 359; Foster's *Town Government in R. I.*, J. H. Studies, Fourth Series, II, 28). The case of *Randall vs. Robinson*, as Judge Durfee observes, not only "shows how utterly powerless the judiciary was under the charter in any conflict with the legislature," but also "illustrates the danger attending the exercise of judicial power by the legislative branch of the government." (*Gleanings, etc.*, 42). In the celebrated case of *Trevett vs. Weeden*, in 1786, the Assembly compelled the judges of the Superior Court to answer for having declared one of its legislative acts unconstitutional. (*R. I. Col. Rec.*, X, 219-20; *Gleanings, etc.*, 52, *et seq.*).

The decision of Chief Justice Ames in the case of *Taylor vs. Place* rendered in 1856 put an end to the exercise of judicial power by the Assembly. That body delayed action in the case of *Ives vs. Hazard* which came up shortly after the above decision was rendered, and was constantly before it until February, 1860, when it was finally withdrawn. Judge Durfee says that "since then the Assembly has never, intentionally at least, encroached upon the proper province of the judiciary." (*Ibid.*, 65.)



*Section IV.—The Legislative Function.*

As has been noted, the Assistants were given legislative power by the second charter for the first time in Rhode Island history.<sup>1</sup> This charter declared the Governor or Deputy Governor and at least six Assistants necessary to constitute a quorum of the Assembly,—no reference being made to the Deputies as an essential part of that body.

Being thus constituted, the Assembly was given power to admit freemen,<sup>2</sup> to establish courts and other necessary offices, to elect and commission officers, to make and repeal laws and ordinances, to regulate elections, and to alter or annul sentences of the various courts of the colony.<sup>3</sup> The only restriction upon the exercise of this authority was imposed by an ingeniously worded clause of the charter which virtually annulled itself.<sup>4</sup> Not only was the legislature of the colony thus freed from royal interference, but it was also independent of the Governor, since he was not given the veto power.<sup>5</sup> The people of Rhode Island were therefore able to conduct their government in the same spirit of independence that had previously characterized the towns.

To be sure the failure of the charter to recognize the presence of a majority of the Deputies as necessary to constitute a quorum, was soon noted by the people, and in November, 1672,

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<sup>1</sup> See *supra*, p. 58.

<sup>2</sup> This provision led to the final displacement of the charter in 1842.

<sup>3</sup> *R. I. Col. Rec.*, II, 9-10; Douglass' *Summary*, II, 81-2; Chalmers' *Annals*, 275.

<sup>4</sup> It required that the "laws, ordinances and constitutions soe made, bee not contrary and repugnant unto, butt, as neare as may bee, agreeable to the lawes of England, considering the nature and constitution of the place and people."

<sup>5</sup> In 1732 the law officers of the Crown decided that "by the charter of Rhode Island the governor had not veto power," and "more than all the King himself had no power reserved in the charter either to sanction or to veto any act of the Assembly that was not inconsistent with the laws of England." (Arnold, II, 108; Palfrey, IV, 130-1.)

the Deputies made a formal demand for greater recognition. After citing the privileges accorded all English citizens by the Petition of Rights, they claimed, as "representatives of the freemen" of the colony, the prerogatives accorded the House of Commons in England. A reform bill was then passed requiring: (1) That "noe tax nor rate from henceforth shall be made layde or levied on the inhabitants of this Collony, without the consent of the Deputys present pertaining to the whole Collony;"<sup>1</sup> and (2) That "in all weighty matters, wherein the King's honor is most concerned, and the peoples antient right and libertys most jeopardd . . . the Assembly shall be the major part of the Deputys belonging to the whole Collony, as there must be the major part of the Assistants (by the charter). Butt otherwise, such said act (if made without the major part of Deputys present), such said act shall be voyd and of none effect."<sup>2</sup> Thus, instead of equalizing the power of these bodies, an advantage was given to the Deputies, since they outnumbered the Assistants, and all acts were passed by a joint vote. This inequality was not offset until 1696,<sup>3</sup> when the Assembly was divided into two co-ordinate branches, each having power to originate any bill<sup>4</sup> and to negative the legis-

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<sup>1</sup> In May, 1678, another restraint upon the taxing power of the Assembly was imposed by an act which required notice of all levies to be given in advance to all towns of the colony. (Arnold, I, 441).

<sup>2</sup> *R. I. Col. Rec.*, II, 472-3; Arnold, I, 364-5.

<sup>3</sup> For more than thirty years after its organization the Assembly was a unicameral body. This was not, however, in harmony with the ideas of the people, since the colonial records (II, 63) show that it had become "a long agitation" as early as the second meeting of the Assembly in October, 1664. By numerous expedients and compromises final action on the matter was deferred until May, 1696, when the two houses separated, and the Governor, Deputy Governor and ten Assistants became the Upper and the Deputies the Lower House of the Assembly. See Prof. T. F. Moran's *Rise and Development of the Bicameral System in America*, J. H. U. Studies, Thirteenth Series, V, 22-6.

<sup>4</sup> In Rhode Island alone of all the New England colonies the Senate had undisputed power to originate money bills as late as the Revolution.

lative acts of the other.<sup>1</sup> The relations between the two bodies continued unaltered throughout the remainder of the colonial period, and in fact down to the present time.<sup>2</sup> When the colony became independent of Great Britain the charter as a constitution of civil government was abrogated, yet the form of government which was established by it was continued by common consent without any essential change,<sup>3</sup> and throughout the constitution-making period which followed the close of the struggle with England, Rhode Island, like Connecticut, retained her old charter as a state constitution. After the close of the Revolutionary War, the Upper House of the Assembly, which had been called the "Council," was dignified by the more republican and euphonious title of "Senate."

#### *Section V.—The Constitution of 1842.*

This instrument provided that the government of the state should still be "distributed into three departments, the legislative, executive, and judicial."<sup>4</sup>

The chief executive power was vested in a Governor and a Lieutenant Governor, both of whom were elected annually.<sup>5</sup>

The judicial power was vested in a Supreme Court and in such inferior courts as the General Assembly might ordain and establish.<sup>6</sup>

The legislative function was vested in a General Assembly which continued to exercise the powers it had "hitherto exercised, unless prohibited by the constitution."<sup>7</sup> It was com-

<sup>1</sup> Rhode Island is the only New England State in which the Governor and Deputy Governor are still *ex officio* members of the Senate and the Governor is denied a veto power.

<sup>2</sup> See *infra*.

<sup>3</sup> Pease and Niles' *Gazetteer of Conn. and R. I.* (1819), 313.

<sup>4</sup> Art. III.

<sup>5</sup> Art. VII, Sec. 1. In 1854 the pardoning power was placed in the hands of the Governor "with the advice and consent of the Senate." (Amendments to the Constitution of 1842, Art. II.)

<sup>6</sup> Art. X, Sec. 1.

<sup>7</sup> Art. IV, Sec. 10.

posed of two branches—a House of Representatives and a Senate.<sup>1</sup> The former was based upon population, each town being entitled to at least one Representative and not more than one-sixth of the whole number.<sup>2</sup> The Upper House was based upon a different and somewhat arbitrary principle,—only one Senator being elected annually from each town regardless of population.<sup>3</sup> As in colonial times, both bodies continued to meet together in “Grand Committee” for the transaction of matters pertaining to elections.<sup>4</sup> When sitting apart, the powers and privileges of both continued to be co-equal in every respect. The now effete and totally illogical principle of limiting the prerogative of the Senate in the origination of money-bills was still ignored as it had always been in Rhode Island. Due caution was shown in regard to public finance by the incorporation of a provision that a two-thirds vote “of the members elected to each house,” was necessary to appropriate “public money or public property for local or private purposes.”<sup>5</sup> The spirit of regard for the primary source of authority which has always characterized Rhode Island both as a colony and a state was not totally ignored in this constitution. There were two provisions which restricted the power of the General Assembly: (1) It was not allowed, except under certain circumstances, “to incur State debts to an amount ex-

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<sup>1</sup>Art. IV, Sec. 2.

<sup>2</sup>Art. V, Sec. 1.

<sup>3</sup>Art. VI, Sec. 1. This protection of the rights of the minority is one of the fundamental principles for which Rhode Island contended upon the formation of the Federal Constitution. This “most conservative element in their whole system of government” was incorporated into the Constitution of 1842 in order to “maintain unimpaired the equal rights of every section of the State,” and to “prevent any one interest from engrossing a dangerous portion of political power” (Mr. Goddard’s *Address on the Occasion of the change in the Civil Government of R. I.*, 31), since such a city as Providence, which at that time had 25,000 inhabitants and therefore wielded in the House one-sixth of the power, was entitled to exert no more power in the Senate than the town of Jamestown, which at that time had less than 400 inhabitants. (*Ibid.*, 30.)

<sup>4</sup>Art. IV, Sec. 18; VIII, Secs. 3, 7; X, Secs. 4, 5.

<sup>5</sup>Art. IV, Sec. 14.



ceeding fifty thousand dollars," "without the express consent of the people;"<sup>1</sup> and (2) all bills for the creation of corporations, with certain stipulated exceptions, should "be continued until another election of members of the General Assembly," and "such public notice of the pendency thereof" should "be given as may be required by law."<sup>2</sup>

No changes were made in the personnel of the Senate. The Governor still held his position as *ex officio* President of that body, and as such, had a casting vote "in case of equal division," but no veto power.<sup>3</sup> The Lieutenant Governor also retained his position as an *ex officio* member, having equal privileges with the rest of the Senators.<sup>4</sup>

As in other states, the Senate retained a fragment of judicial authority in its power to try impeachments.<sup>5</sup> A person convicted in such a trial was also liable to criminal "indictment, trial, and punishment according to law."<sup>6</sup>

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<sup>1</sup> Art. IV, Sec. 13.

<sup>2</sup> Art. IV, Sec. 17.

<sup>3</sup> Art. VI, Sec. 2.

<sup>4</sup> Art. VI, Sec. 1.

<sup>5</sup> Art. XI, Sec. 2.

<sup>6</sup> Art. XI, Sec. 3.

## CHAPTER V.

### CONCLUSIONS.

#### *Section I.—Origin of the New England Senates.*

If the facts here set forth have been correctly apprehended, the State Senates of New England did not originate in a desire to transplant to American soil the English House of Lords; but on the contrary, they are in their most important and essential features, the results of a natural course of development under circumstances and conditions peculiar to the colonies themselves.<sup>1</sup> To be sure they bear some crude analogies to the House of Lords, but analogies alone are dangerous premises from which to deduce conclusions as to the origin of institutions, since they may be due not to imitation but to common race instincts or to similarity of circumstances.<sup>2</sup>

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<sup>1</sup> This phase of the subject has been presented by James Harvey Robinson in the *Annals of Amer. Acad.*, I, 203-243, and by William C. Morey in *ibid.*, 529-557, also in *ibid.*, IV, pt. 1, 201-232.

<sup>2</sup> "A strong current of similar events will produce coincidences in the history of nations whose whole institutions are distinct; much more will like circumstances force similarly constituted nations into like expedients; nay, great legislators will think together even if the events that suggest the thought be of the most dissimilar character. No amount of analogy between two systems can by itself prove the actual derivation of the one from the other." (Stubbs' *Constitutional Hist. of Eng.*, second edition, I, 207).

"We see the same political phænomena repeating themselves over and over again in various times and places, not because of any borrowing or imitation, conscious or unconscious, but because the like circumstances have led to the like results." (Freeman's *Comparative Politics*, 32).

These analogies between the Senate and the House of Lords lose their force as arguments when we consider the facts that :

1. The Councils from which the Senates developed, originated in ideas foreign to the English political system. The charters upon which the government of the colonies were based, owe their origin not to the political but the commercial policy of the mother country.<sup>1</sup> Hence the Council of Massachusetts was evolved from the Board of Directors of a trading company<sup>2</sup> and furnished in turn, the model for those of Connecticut<sup>3</sup> and New Hampshire;<sup>4</sup> while in Rhode Island it was merely a revival of the Hebrew Court of Elders,<sup>5</sup> and previous to the granting of the charter of 1663 by which its government was assimilated to the common model, this body had no legislative power whatever.

2. The transition from Council to Senate was not made through any conscious efforts to conform to British models. The preceding pages of this study have shown that the successive stages of this development,—the introduction of the representative system,<sup>6</sup> the granting of a negative power,<sup>7</sup> the introduction of the bicameral system,<sup>8</sup> the loss of *ex officio* membership in the Councils,<sup>9</sup> the gradual diminution and final disappearance of their executive and judicial authority, and the differentiation of the powers and privileges of the two branches of the legislatures<sup>10</sup>—either followed from inter-colonial influences or from efforts on the part of the colonists to remove the points of friction in their crudely organized governments, and thus to adapt their primitive institutions to American conditions. If, again, the colonists had imitated a common model in the development of this institution their

<sup>1</sup> For an able presentation of this subject see Prof. Morey's *Genesis of a Written Constitution*, *Annals of the Amer. Acad.*, Vol. I, p. 529 *et seq.*, April, 1891.

<sup>2</sup> *Supra*, p. 10.

<sup>3</sup> *Supra*, pp. 28, 30, note 2.

<sup>4</sup> *Supra*, p. 46.

<sup>5</sup> *Supra*, p. 56.

<sup>6</sup> *Supra*, pp. 18, 56, note 1.

<sup>7</sup> *Supra*, pp. 20, 36-7, 46, 65.

<sup>8</sup> *Supra*, pp. 20-1, 37, 46, 65.

<sup>9</sup> *Supra*, pp. 21-2.

<sup>10</sup> *Supra*, pp. 15, note 1, 22-3, 37.

results would have exhibited more features in common. On the contrary, however, at the formation of the Federal Constitution they differed in almost every characteristic feature,—in size,<sup>1</sup> composition,<sup>2</sup> qualification,<sup>3</sup> basis of election,<sup>4</sup> powers and privileges.<sup>5</sup> In fact, as Prof. Morey forcibly observes, “it might well be said that they were common only in that feature, in which they differed from the English House of Lords, namely, the fact that they were all based upon popular election.”<sup>6</sup>

<sup>1</sup>The size of the early state Senates in New England were as follows: Massachusetts, thirty-one (*supra*, p. 27, note 2); Connecticut, twelve (*supra*, pp. 30, note 4, 38); New Hampshire, twelve (*supra*, p. 52), and Rhode Island, ten (*supra*, p. 58).

<sup>2</sup>In Massachusetts the Governor and Lieutenant-Governor ceased to be *ex officio* members of the Senate in the colonial era (*supra*, pp. 21–2). In Connecticut both retained their seats in this body until 1818 (*supra*, pp. 38–9). In New Hampshire the Senate was composed of twelve Senators, presided over by the President of the state who had a vote equal with the others (*supra*, p. 52). In Rhode Island the Governor and the Lieutenant-Governor still have a seat in the Senate the former being *ex officio* President (*supra*, pp. 66, note 1, 68).

<sup>3</sup>The qualifications for Senator after the Revolution were as follows: Massachusetts—must be an inhabitant of the state five years and of the district at the time of election, have a freehold estate of £300 or a personal estate of £600 (*supra*, p. 26, note 1); Connecticut—must be a citizen of the state (*supra*, p. 39, note 2); New Hampshire—must be a protestant, possessed of a freehold estate of £200 within the state, an inhabitant of the state for seven years preceding election and of the district from which chosen at the time of election (*supra*, p. 23); Rhode Island—citizenship in one of the four principal towns of the colony (*supra*, p. 67).

<sup>4</sup>In Massachusetts the Senators were chosen from electoral districts (*supra*, p. 27, note 2); in Connecticut from the state at large (*supra*, p. 38); in New Hampshire from electoral districts (*supra*, p. 52); and in Rhode Island from the different towns of the state (*supra*, p. 67).

<sup>5</sup>In Massachusetts (*supra*, p. 27), and New Hampshire (*supra*, p. 53) the Lower House alone could originate money bills, while in Rhode Island it could be done by either branch (*supra*, p. 65, note 4). In Massachusetts and New Hampshire the Upper House alone had power to try impeachments.

<sup>6</sup>Annals Amer. Acad., IV, pt. I, p. 22, September, 1893.



*Section II.—Forces which gave Direction to the Development.*<sup>1</sup>

It is difficult to account in a satisfactory way for all the phenomena which appear in the history of this evolution from Council to Senate. Of the many complicated causes which determined the course of this development, from time to time, the following appear to the writer as worthy of mention :

1. *Limitation of the Number of Counsellors.*—In all these colonies the number of Counsellors was fixed by charter and could not therefore increase with the growth of population<sup>2</sup> as could the Deputies or Representatives chosen by the towns. Since the General Courts were at first unicameral bodies, this limitation threatened to destroy the power of the Councils which formed a hopelessly small and constantly diminishing proportion in the membership of these bodies. This cause, enforced by the constant clashing of authority, led to two important results in the evolution of the Councils: (1) The granting of a negative vote to each of the constituent parts of the General Courts over the acts of the other,<sup>3</sup> and (2) The introduction of the bicameral system.<sup>4</sup>

2. *Extent of Authority, and Growth of the Colonies.*—The Councils not only enjoyed a legislative power which was co-ordinate with that of the popular branches, but their authority also extended originally over the executive and judicial domains. Thus the body which was incapable of increase was granted powers which extended into every department of government, while the larger and more elastic body, numerically speaking, was preëminently a legislative body. Upon the

<sup>1</sup> No author, within the knowledge of the writer, has hitherto attempted to go into the details of this discussion.

<sup>2</sup> It is not probable that the colonists, who were jealous of the aristocratic tendencies of these bodies, desired to increase their number. See *supra*.

<sup>3</sup> *Supra*, pp. 20, 36–7. New Hampshire was an exception. Having had the benefit of the experiences of Massachusetts she settled this question without a struggle (*supra*, p. 46).

<sup>4</sup> *Supra*, pp. 20–1, 37, 65.

growth of the colonies and the consequent increase of public business; it became impossible for the Counsellors to attend to their numerous and constantly accumulating duties. Since their number was not permitted to increase to a degree commensurate with the burdens of their office, the problem could only be solved by restricting the scope of their authority. This resulted in a diminution of their executive and judicial duties in the following ways: (1) By the delegation of their powers, especially those of a judicial nature;<sup>1</sup> (2) By the creation of judges outside their ranks;<sup>2</sup> and (3) By a reduction of the number of Counsellors necessary to constitute a quorum.<sup>3</sup>

3. *Illogical Principle upon which Power was Distributed.*—Instead of having a wholesome system of checks and balances, the colonial governments present a union of the most incompatible principles of authority. The Counsellors were at the same time intrusted with the making, the interpreting, and the executing of laws. As members of the General Courts, which constituted the supreme judicial tribunal of the colonies, they heard and were allowed either to help determine or at least to express opinions on cases of appeal from their verdicts as courts of the first instance. They were also required to act upon bills for the regulation of the judicial system—in which they were of course personally concerned—before such bills could have the force of law. The most serious defect of such a distribution of power was perhaps its effect upon the offices of relatively small importance. Since the Counsellors acted in several capacities, they were usually chosen with regard to their most important function. This principle of choice might lead to the selection of an efficient legislative body, but since those most efficient in legislation are not always the most capable in administration and adjudication, one or both of these functions must suffer by such a union. The colonists saw and opposed some of these incongruities

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<sup>1</sup>*Supra*, pp. 17, 33–5, 45, 62.

<sup>2</sup>*Ibid.*

<sup>3</sup>*Supra*, p. 10, note 2.

from time to time, but were unable to effect the necessary changes before the formation of their State Constitutions.

4. *Introduction of the Idea of a Complete Separation of the Functions of Government.*—Although the growth of the colonies and the illogical distribution of power tended to a differentiation of governmental functions, it is not probable that this principle would have been so clearly and uniformly applied as it is at present, if the Montesquieu<sup>1</sup> doctrine of a complete separation of the functions of government had not gained an ascendancy in the colonies just as they were entering the great constitution-making epoch in their history. Hence the introduction of this idea must have hastened, at least, the final step in the evolution of the Senate.

5. *Inter-Colonial Influences.*—This force is particularly noticeable in the New England colonies, since their laws and institutions are alike in many respects, and come for the most part from the same mother colony. This natural predilection was further increased by their close proximity to each other and their isolation from the mother country, their homogeneity in race and language, and their common dangers and ambitions. These things produced an intercourse among them, which resulted in the general dissemination of American principles.

6. *English Charters and Precedents.*—The various charters of the New England colonies have a common origin and therefore resemble in many respects. They furnished the broad

<sup>1</sup>“Zuerst hat Montesquieu das moderne Princip mit Nachdruck und mit Erfolg verkündet.” (Bluntschli’s *Statslehre*, 588.)

“Lorsque, dans, la même personne ou dans le même corps de magistrature, la puissance législative est réunie à la puissance exécutrice, il n’y a point de liberté, parce qu’on peut craindre que le même monarque ou le même sénat ne fasse des lois tyranniques pour les exécuter tyranniquement.

“Il n’y a point encore de liberté si la puissance de juger n’est pas séparée de la puissance législative et de l’exécutrice. Si elle était jointe à la puissance législative, le pouvoir sur la vie et la liberté des citoyens serait arbitraire; car le juge serait législateur. Si elle était jointe à la puissance exécutrice, le juge pourrait avoir la force d’un oppresseur.” (Montesquieu’s *De L’Esprit de Lois*, Book XI, Ch. VI.)

outlines of government and thus gave general direction to the development of institutions which are distinctly American. The colonists were also conversant with the English Constitution and began at an early day to cite such English precedents as might be in their favor. The extent of both these influences may, however, be easily exaggerated, since the most beneficent features of colonial government,—the representative system for example<sup>1</sup>—were not established by any charters until they had become established in the colonies; and again, the assertion of a claim to the benefits bestowed by any particular English precedent was by no means tantamount to a concession on the part of those with whose ideas or interests it came in conflict. For instance, the right of the popular branch to originate money bills was asserted in Massachusetts at a comparatively early date. This demand was doubtless based upon English precedent, but since the charter contained no such provision, the point at issue was not finally conceded without a series of conflicts extending over a long period of time. In fact, English precedents had to fight their battles anew on American soil, and were seldom incorporated into the government of the colonies before they had shown themselves worthy of a place in our political system. Hence those features which were usually claimed as an inheritance and consciously adopted, were “not so much the customary forms which entered into the structure of the British government as those chartered privileges which might serve to protect them from the supervision and interference of autocratic power.”<sup>2</sup>

### *Section III.—Inherited Characteristics of the Senates.*

Although, as has been noted, the Councils in the New England colonies presented many essential points of contrast to each other, there is, nevertheless, a certain degree of unity

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<sup>1</sup>*Supra*, p. 18.

<sup>2</sup>Morey's *First State Constitutions*, *Annals Amer. Acad.*, Vol. IV, pt. 1, 32, September, 1893.



in this diversity. They exhibited certain features in common which have been transmitted, to their successors. The most striking of these are the contrasts between the Councils and the Lower Houses of the Assemblies on the following points :

1. *Size*.—The Councils were always the smaller of the two branches of the Legislature. Their number was usually fixed by charter and was not, therefore, subject to the degree of variation that is noticeable in the Lower Houses.

2. *Personnel*.—The Councils were composed of the more dignified and conservative portions of the population. The Representatives were chosen from among the people and were therefore more closely in touch with them, and hence more radical in principle.

3. *Basis of Selection*.<sup>1</sup>—The Counsellors represented a larger constituency than the Representatives, who were always chosen by towns or hundreds.

4. *Term of Office*.—The Counsellors were chosen for a long term,<sup>2</sup> while the Representatives were always chosen for a brief period.

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<sup>1</sup> The method by which the Counsellors were chosen varied from time to time. See *supra*.

<sup>2</sup> In Massachusetts and Connecticut the Counsellors had at first practically a life-tenure. See *supra*.

IV-V

SLAVERY AND SERVITUDE IN THE COLONY  
OF NORTH CAROLINA



JOHNS HOPKINS UNIVERSITY STUDIES  
IN  
HISTORICAL AND POLITICAL SCIENCE  
HERBERT B. ADAMS, Editor

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History is past Politics and Politics are present History.—*Freeman*

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FOURTEENTH SERIES

IV-V

SLAVERY AND SERVITUDE IN THE COLONY  
OF NORTH CAROLINA

BY JOHN SPENCER BASSETT, PH. D. (J. H. U.)  
PROFESSOR OF HISTORY AND POLITICAL SCIENCE IN TRINITY COLLEGE,  
NORTH CAROLINA

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### PREFATORY NOTE.

The story of the negro in the colony of North Carolina must be reconstructed out of very unsatisfactory materials. If any point in this monograph should not appear to be treated fully enough it must be considered as due to that cause. Any suggestion of further facts on the subject will be duly appreciated.

I desire to acknowledge my indebtedness for assistance to Drs. Adams, Steiner, and Ballagh, of the historical department of the Johns Hopkins University, and to President L. L. Hobbs, of Guilford College, North Carolina.

J. S. B.

*Durham, N. C., February 5, 1896.*





## CONTENTS.

### CHAPTER I. THE INTRODUCTION OF SLAVERY.

The Conditions of Settlement . . . . .	11
Estimate of Numbers . . . . .	19
Importation . . . . .	22
Distribution of Slaves . . . . .	24

### CHAPTER II. THE LEGAL STATUS OF SLAVERY.

Laws relating to Slavery . . . . .	27
The Slave in Court . . . . .	28
Runaways . . . . .	32
The Slave's Right to Hunt . . . . .	36
The Slave's Right to Travel . . . . .	39
The Slave's Right to Property . . . . .	40
The Slave's Right to Life . . . . .	42

### CHAPTER III. RELIGIOUS AND SOCIAL LIFE OF THE SLAVES.

Religion . . . . .	45
Social Life . . . . .	56
Slave Insurrections . . . . .	60

### CHAPTER IV. THE FREE NEGRO AND INDIAN SLAVES.

Emancipation . . . . .	65
Free Negroes . . . . .	66
Indian Slavery . . . . .	71

### CHAPTER V. WHITE SERVITUDE . . . . . 75



# SLAVERY AND SERVITUDE IN THE COLONY OF NORTH CAROLINA.

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## CHAPTER I.

### THE INTRODUCTION OF SLAVERY.

The lives of the American slaves were without annals, and to a large extent without conscious purpose. To get the story of their existence there is no other way than to follow the tracks they have made in the history of another people. This will be a slow and, in a sense, an unsatisfactory labor. At best it can give but a partial picture of the real life of the slaves, yet it can give all there is to give. Those who in these days of a clearer view and a broader sympathy have come to look on the former bondsmen as a race having their proper place in the evolution of the human family, must be content to gather up as many facts as can be found and to regret that circumstances have made it impossible to obtain a more complete story.

To have come to America as a slave was not without an advantage to the negro, however disadvantageous it may be for his historian. The progress of a race is the lengthening of the experience of its earliest individuals. As each succeeding generation discovers new fields of knowledge, the experience of the former generation is thrust back to a stage in the individual's training previous to that which is considered the summit of an educated life. The facts which men now living are working out in laboratory and study will in a short time become a part of that general store of experience that will be standard knowledge for the schoolboy of the coming generation. That which any one learns from others is but the sum of the contributions made



by those who have already lived. The experience which was the contribution of the earliest man must, therefore, be referred to a very early stage in the accumulation of this whole. Since his day the race has been but lengthening his life by successive steps in progress.

Now, the negro when he came to America was far back in this stage of progress. It is usually agreed that for ages he had developed none at all. When he came from Africa he came into contact with the most advanced type of experience in the history of man. It was his task to learn that experience. Viewing the matter from the standpoint of his development, it was his chief task to learn it. How could he best learn it? The answer is, he must learn it as another person who stands to this experience in the same relation with the negro, that is to say, as a child. The same reasoning which in all social systems recognizes the expediency of placing the child under the dominant direction of his more experienced parent, will be effective in showing that in the days of the earliest contact of the white man and the black man it was a useful thing for the latter that he took his first lessons in civilization in the rigorous school of slavery. Hard as the process was on the spirit of liberty in the black man, and costly as it proved itself in the life, the treasure, and the slow development of the white man, yet it is difficult to see how the aimless, good-natured, and improvident African could ever have been brought as a race to plow, to sow, to reap, to study, and at length to create thought, except for the tutelage of his slaveholding master.

The coming of the negro to the New World was due to economic causes. It arose from the meeting there of the two conditions of an abundant supply of undeveloped wealth and of a scanty supply of labor with which to develop it. This conjunction was due to a sudden widening of the spheres of industrial activities which in that day had been forced on the world. It was abnormal in itself and it led to an abnormal method of meeting it. It led to the forcible taking of men whose weakness made them unable to resist,

and the bringing of them to work in the mines, forests, or fields on the American coasts. As these two unusual conditions of abundant land and a sparse population were in a measure relieved, the bondage that they had brought into the world ceased to grow, and then gradually grew less. That its final removal was accomplished by a most unhappy war against the smaller portion of this original slaveholding area was an unfortunate incident of the progress.

Conditions in the South were favorable to slavery. Large stretches of fertile land, warm climate, at once congenial to the negroes and enervating to the whites, and in some places unhealthy regions where white men did not care to work; all these helped to draw slavery to America. Planted at first in the Spanish possessions of the West Indies, it spread as soon as the mainland was settled along the entire coast from Jamestown, both northward and southward. The method by which this extension was accomplished is interesting. It may be divided for our purposes into two stages, an experimental stage and a stage of diffusion.

So far as the South was concerned, the experimental stage in the development of American slavery belongs to the history of Virginia, and possibly of Maryland. Chronologically speaking, that stage belongs to the seventeenth century. The Dutch traders, when they brought their human freight to Jamestown, were, according to the ways of trade, trying to open up a field for a new line of commerce. The planters that bought this new commodity did it no doubt without feeling sure that it would be a success. They found the Africans to be untamed, degraded, superstitious and dull. Could they make these into steady and reliable laborers? The partial success of the West Indies was before them, and they set out to try. In two respects they differed materially from the West Indian planters: 1. The harsh usage of the Spaniards in the latter region had destroyed the original Indian population, so that the whites were relieved of the ordinary fear of Indian atrocities. In Virginia it was not till toward the close of the seventeenth

century that the savages were driven so far inland that the eastern part of the colony was safe from their attacks. Manifestly it would have been a dangerous affair for the colony to have attempted to absorb and to tame a large number of African slaves while there was fear of the Indians in their midst. 2. The nature of the task before the Virginians was different from that before the West Indians. The latter had gone into the business with the idea of establishing colonies of slaves, driven to the fields and back to the barracks as the Indians of the *encomienda* or as the slaves of the Roman *latifundium*. This was the Spanish ideal. The ideal of the Virginia planter, on the other hand, was that of the English country gentleman. He expected to live on his estate himself, and he wanted to group his slaves around him where he would know them, physic them, give them in marriage, and in his good-natured way train and swear at each one individually. To accomplish such an ideal demanded a great deal more in the way of absorption than was necessary in the Spanish system. It would take a much longer period of training to make the negro acceptable as a servant according to the Virginian's idea than according to the Cuban's. As a matter of fact, it usually took two or three generations to make him in any safe sense tractable. It was at least a half-century after the experiment began before Virginia was satisfied that its issue would be favorable. She then had the nucleus of a slave population which henceforth, both by natural increase and by further importation, she was rapidly to make an extensive part of her population.

There were three obstacles which everywhere in the South it was necessary to have removed before negro slavery could be widely diffused: 1. The Indians, as has already been said, must be either exterminated or driven into the interior, so that there should be no danger of Indian massacres. 2. The white population must become dense enough to be able to resist an attempt on the part of the negroes to strike for freedom. Tractable as the negro may have become

in the course of three generations of slavery, there never was a time when he became so submissive that he could be considered beyond the probability of an insurrection. The whites understood this, and not until they had reached communities settled to a tolerable degree of density did they dare to introduce a large number of negroes. 3. The earliest importation of a class of laborers into the New World was that of indented white servants. Slavery had to encounter these in its period of diffusion in all the Southern colonies. There was a struggle between the two systems. This proved itself to be a case of the survival of the fittest. The negroes were fitter to be slaves than the whites and they remained masters of the field. When these three obstacles had been overcome the diffusion of slavery over new territory might go on prosperously.

When North Carolina was beginning to be settled, slavery was just finishing its experimental stage in Virginia. The people here were from the first satisfied with the profitability of slaves, and took them with them as they went from the lower counties of Virginia to settle plantations on the shores of the Albemarle Sound. The three obstacles to diffusion they found it necessary to surmount. The danger of Indian attacks was not passed till 1712, when, having defeated and almost exterminated the Tuscaroras, they found themselves no longer in danger from such a source. It was about the same time that the people became densely enough settled to be able to handle the much dreaded negro rebellions should they come.<sup>1</sup> As for the indented servants, as will be shown later on, they never were a serious factor in the history of the colony. They came into it along with the earliest settlers, but the acceptance of slavery in Virginia had already sealed their fate. They never became numerous, and they

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<sup>1</sup> It is of interest to note that negroes were not extensively introduced into Maryland till the beginning of the eighteenth century. (Cf. Brackett, "The Negro in Maryland," p. 38.) They were not introduced extensively into Virginia until near the end of the seventeenth century (cf. Ballagh, "White Servitude in Virginia," Johns Hopkins University Studies, Series XIII., p. 349, note).



were, from the conditions of life, never a very satisfactory kind of labor.

The manner of the spread of slavery after it had once entered the settlement is of interest. It reveals clearly the whole process by which the country yielded itself to the healthy ring of the civilizing axe. A lodgment was first effected in the extreme northwestern part of the colony, most of the people, free and slave, coming from Virginia. Either from natural increase, or from the capture of a few hostile Indians, or from importation from Virginia or New England, there was from the first an increasing supply of slaves. When a farmer moved into the colony he usually brought one or two slaves with him, or he bought about that number soon after he got himself settled. To settle a new plantation without negroes was considered a hopeless task.<sup>1</sup> Most of the men that came in to settle were men of small means, and they accordingly took up small farms. Having secured a piece of land, the incomer would go to work with his slaves to clear it, to plant it, and to build a house on it. He would not need much cleared land at first, for here the people did not devote themselves so extensively to the cultivation of tobacco as in Virginia. They had fine natural ranges for stock and raised many cattle and hogs for the markets to the north of them. If the farmer were thrifty he would have cleared his farm at the end of a few years, or at least as much of it as he did not want to save for his cattle range. At that time his stock of negroes would have increased. His most natural course now was to take up another tract of land, to divide his cattle and negroes, and, under the care of an overseer, to place a part on this new farm. This land cost him almost nothing, and if he did no more than support his slaves and cattle he would be getting wealthy from their natural increase. With two farms stocked, the increment of gain would be accelerated, and in a short time a third could be taken up. Then would come a fourth, a fifth, and in the course of a lifetime a

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<sup>1</sup> Colonial Records of North Carolina, I., pp. 41, 601, 715, and VI., 745, 1026.

thrifty man might acquire a number of farms, each of which was stocked with negroes. This process was checked when the available land for settling in the older communities had been taken up, so that now if one wanted new land he must go some distance to the frontier. When such a stage had been reached the owner would begin to sell his slaves to those who were going to the new communities, or to allot them to some son or daughter who was going to the same place. Thus the negro went side by side with the white man in the van of the civilizing forces of the country.

The lords proprietors of Carolina recognized the value of slaves to the settlers from the first. In the Concessions of 1665, their earliest announcement of terms of settlement in Albemarle, they offered to give every master or mistress who should bring slaves into the province fifty acres of land for each slave above fourteen years of age so imported.<sup>1</sup> This custom, with slight variation, was kept up during the colonial period.<sup>2</sup> To make slavery secure in its legal aspect the proprietors declared in the famous Fundamental Constitutions that all masters should have absolute power over their negro slaves.<sup>3</sup> Thus the proprietors recognized the value of slaves in settling the lands. As long as the colony was in the hands of these owners, and also while it was in the hands of the king, slavery enjoyed all the immunity that was implied in these conditions.

Three distinct streams of immigrants entered North Carolina. 1. The immigrants from Virginia came earliest. These

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<sup>1</sup> Col. Recs., I., 86.

<sup>2</sup> It is embodied in the instructions to Governor Burrington in 1730 (Col. Recs., III., 101-102); in those to Governor Dobbs in 1754 (*ibid.*, V., 1133); and in those to Governor Tryon in 1765 (*ibid.*, VII., 127). It is likely it was in that of Governor Martin in 1771, which unfortunately, it has been impossible to examine. It is well to note, however, that Gov. Johnston in 1735 said he knew of no such instruction. The leaders of the colonists declared that such had been the custom. It was decided not to follow the custom, but how long this was enforced does not appear (*cf. ibid.*, IV., 60).

<sup>3</sup> *Ibid.*, I., 204.

came in two rather well discerned movements. The former was that early movement of men of small means who came down into the unoccupied lands on the tributaries of the Albemarle Sound. They were not powerful and their settlements developed slowly. To them chiefly does the history of the colony in the seventeenth century belong. They brought a few slaves with them, though from the scarcity of records for this period we have very little idea of how many came or under what circumstances they lived. The latter of these two movements from Virginia came about the middle of the eighteenth century, or perhaps a little earlier, and filled up the counties in the northern and central part of the State. Edgecombe, Northampton, Halifax, Bute, and a part of Granville received the force of this movement. The people were largely the younger members of leading families in the northern colony, who took their slaves and moved south to build fortunes for themselves where land was cheaper. In some cases they were members of these same families whose extravagant living had made it necessary for them to gather up the fragments of property they still had left and to begin life again on the frontier.<sup>1</sup> These all brought slaves, and they used large numbers of them. 2. The southeastern part of the State was geographically distinct from the northeastern part. It remained for many years unsettled.<sup>2</sup> About 1730 Governor Burrington succeeded in turning immigrants in that direction. These people took up the rich lands around Brunswick and Wilmington, and gradually extended westward till they reached Bladen, Cumberland, and Anson counties. This stream brought slaves with it also. Having a good harbor, it attracted many people of means, not a few coming from South Carolina, and the rich lands along the lower Cape Fear soon came to be occupied by many rich and well-bred planters. This section had a

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<sup>1</sup> See Dr. K. P. Battle's "Address on the Life and Services of General Jethro Sumner," p. 15.

<sup>2</sup> No account is here taken of the Yeamans colony, which soon removed, and which accordingly made no impression on the history of the province.

considerable trade with Europe, the West Indies, and the other colonies, and it is likely that it received most of its slaves through that trade. It became the most prosperous slaveholding section of the colony. 3. While this region was being occupied, the van of a third body was entering another part of the colony. Starting from Pennsylvania it came down the valleys of western Virginia and settled the central and western part of North Carolina. It was composed of Scotch-Irish, Germans, a few Welch, some New Englanders, some New Jerseymen, and not a few who from one or another place had already settled on the Virginia frontier. These were almost always small farmers, owning little property and very few slaves. Except for a few wealthy men who later came in from Virginia, or who came up as officers of the law from the older settlements in the east, they took small holdings of land and set out to clear and cultivate them with their own hands. As they progressed in wealth they yielded to the influence of environment, and slaves at the time of the Revolution were being used in considerable numbers among them. They were, however, never so strongly slaveholding as the east. It is well to remember that this section, especially the western part of it, remained till the Civil War the center of the anti-slavery sentiment of the State.

*Estimate of Numbers.*—To estimate the number of slaves in North Carolina at any time in the first seventy-five years of its existence is a very difficult matter. The colony was during this period increasing in population very slowly, and it was not till the end of the Tuscarora war, 1712, that the introduction of slaves may be considered as unimpeded. In 1709 Reverend John Adams, a missionary of the Church of England, wrote that there were in Pasquotank precinct 1332 souls, of whom 211 were negroes,<sup>1</sup> while in Currituck precinct there were 539 souls, 97 of whom were negroes.<sup>2</sup> Thus in

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<sup>1</sup> Col. Recs., I., 720.

<sup>2</sup> Ibid., I., 722. There were at that time four settled precincts in the colony. Besides these, there was a new county, Pamlico, on the river of that name, which contained probably about as many people as one of the older precincts. These were the only white settlements in the colony.



each of these two precincts about one-sixth of the whole population was black. It is likely that this proportion was correct for all the precincts. Inasmuch as Chowan and Perquimons precincts were older and in some respects more thriving places, it is likely that they contained over 400 negroes. Pamlico, too, must have had some blacks; so that it is a safe estimate to say that at this time there were about 800 negroes in the colony.<sup>1</sup> In 1717 Colonel Pollock, who was one of the most intelligent men of the early period of the colony's history, estimated the number of taxable persons in the country at 2000.<sup>2</sup> Now, by a law of the Assembly of 1715 all negroes of twelve years or more, male or female, and all male whites of sixteen years or more, were to be taxed.<sup>3</sup> We know that in 1850 the ratio of negroes over twelve years of age to the entire negro population was as ten to eighteen, and that the ratio of whites over sixteen to the entire white population was as ten to forty. So if we suppose there to be still six times as many whites as blacks, then we may estimate the number of whites in the province at about 6000 and the blacks at about 1100.<sup>4</sup> In 1730 Governor Burrington wrote that the whites in the colony were "full 30,000, and the negroes about 6000."<sup>5</sup> We have no further estimate until 1754. In that year we have the first census of the colony, so far as the records show. The clerks of the several county courts, by instruction, made a return to the Governor of all the taxables in their respective counties.

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<sup>1</sup> Dr. Hawks says ("History of North Carolina," II., 340) that in 1700 there were 6000 whites in the colony. If we put the proportion of blacks to whites at one-sixth, this will give us about 1000 blacks in 1700, a number that would have been considerably larger by 1709. Perhaps a better estimate would be midway between the 800 and 1000.

<sup>2</sup> Col. Recs., II., p. xvii.

<sup>3</sup> Ibid., II., 889.

<sup>4</sup> In 1720 Boone and Barnwell, of South Carolina, put the total number of taxables at 1600. They were probably mistaken. They did not know the colony, and their language shows that they bore it no goodwill. Pollock is a much safer authority (cf. Col. Recs., II., 396 and 419).

<sup>5</sup> Ibid., Vol. II., p. xvii.

The blacks were 9128 and the whites 15,733.<sup>1</sup> If we follow the ratios just estimated on the basis of the census of 1850 we shall have a total negro population of about 15,000, and a total white population of 62,000. Thus there was in the province an entire population of 77,000. Governor Dobbs pronounced the census of 1754 defective, the people, as he said he had learned, holding back their taxables.<sup>2</sup> The error could not have been very great, for when a year later he himself ordered a more correct return the total number of negro taxables was 9831, five counties being estimated in the manner just stated.<sup>3</sup> Another census was made in the same way in 1756, when it appeared that there were 10,800 negro taxables, five counties still being estimated,<sup>4</sup> and about 15,000 white taxables, giving totals of about 19,000 blacks and 60,000 whites.<sup>5</sup> In 1761 Governor Dobbs, writing to the home government on the condition of the colony, reported that there were not 12,000 negro taxables in its borders, and he added that the increase in the entire population came mostly from births, since but few people had come in since the French and Indian War.<sup>6</sup> In 1764 he placed the number at 10,000,<sup>7</sup> so that we must put his estimate at some point between these two numbers. This was a very erroneous estimate, however; for the very next year a census was taken by the method formerly used, and it appeared that there were in the colony 17,370 negro, and 28,542 white, tithables.<sup>8</sup> On this basis the entire population must have been about 30,000 blacks and 114,000 whites. Another census, made in 1766, gives 21,281 negro taxables,<sup>9</sup> eleven counties being estimated, and the figures of two more

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<sup>1</sup> The returns for five counties do not distinguish between white and black taxables. In such cases the number of blacks has been estimated on the basis of the whites and blacks in all the other counties, which cannot be very far wrong (*ibid.*, V., 320).

<sup>2</sup> *Ibid.*, V., 461 and 471. <sup>3</sup> *Ibid.*, V., 575. <sup>4</sup> *Ibid.*, V., 603.

<sup>5</sup> These returns must be very unreliable. That of 1756 shows that in a majority of the counties the estimates had not been revised since 1755. This accounts for the great increase when we come to the returns for 1765.

<sup>6</sup> *Ibid.*, VI., 613-614.

<sup>7</sup> *Ibid.*, VI., 1027 and 1040.

<sup>8</sup> *Ibid.*, VII., 145.

<sup>9</sup> *Ibid.*, VII., 288-9.

being taken from the returns of 1765. This would give a total negro population of 37,000. A census taken in 1767 gives 22,600 black, and 29,000 white, taxables,<sup>1</sup> eight counties being estimated. This would be a total of about 39,000 blacks and 116,000 whites. These are the official returns, and constitute our only means of knowing with any degree of certainty how many negroes there were in the province. It ought to be stated that in 1772 Governor Martin wrote to the British Government that he had discovered that the former governors had overestimated the number of negroes and that the statement could be proved. He promised to correct the mistake,<sup>2</sup> but we have no evidence that he ever fulfilled the promise. He continued to believe in his theory, however; for in 1775, when he was a fugitive from the seat of his government, he wrote that there were very few negroes in North Carolina, except in two or three counties in the extreme southeastern part of the government, and that he did not think that there were over 10,000 in the whole country.<sup>3</sup> In the absence of any specific proof to sustain Governor Martin's position we must give the probability to the official reports, although the matter continues in more doubt than could be wished.

Unsatisfactory as these figures are, they indicate a tendency which is not wholly uninformative. In 1709 about one-sixth of the population was black. In 1717 the ratio was about the same. In 1730 it was, according to Burrington, still the same. In 1754 there was a tendency for the ratio to rise, it being about ten to fifty-one. In 1765, when we come to a new census—those of 1755 and 1756 are of slight use—we find the ratio still rising, it being now ten to forty-eight. In 1767 it has risen till it is ten to thirty-nine. Thus we see that while the colony was growing slowly and was thinly settled, the ratio of blacks to whites remained comparatively constant, but that after the French and Indian War the negroes began rapidly to gain.

*Importation.*—The steadiness of this increase for so long a time indicates that it was due almost wholly to births.

<sup>1</sup> Col. Recs., VII., 539.

<sup>2</sup> Ibid., IX., 259.

<sup>3</sup> Ibid., X., 46.

Such rare information as we have on this point shows that the number imported was inconsiderable. When a person took advantage of the custom giving each newcomer fifty acres of land for each slave he brought with him, it was necessary for him to go into the county court and prove the fact of importation. The records of these courts, so far as we have them, show that very few persons proved their rights to land on this account. For example, in the court of Perquimons precinct in 1706, at which land was granted for importing sixty-nine persons, there are only four of these sixty-nine of whom we are sure that they were negroes, although there are six more whose names may be those of negroes; and all of these were imported by two men.<sup>1</sup> The king did all he could to facilitate the sale of slaves to the colonist by the Royal African Company. In 1730 Burrington was instructed to report on the condition of the company's trade in North Carolina.<sup>2</sup> That officer replied that up to that year this trade had been small, but that he thought that he could improve its condition.<sup>3</sup> It was probably with the same subject in mind that he reported three years later that the colonists had suffered greatly from not buying slaves directly from Africa. He added that under existing circumstances they had been "under necessity to buy the refuse, refractory and distempered negroes brought from other governments," whereas it would, he did not doubt, be an easy matter to sell a shipload of good negroes in almost any part of the province.<sup>4</sup> In a like spirit the king instructed Governor Dobbs, in 1754, not to allow the Assembly to pass any law which would prohibit the importation of slaves or felons,<sup>5</sup> as had been done in some colonies. The Assembly gave the Governor no occasion to enforce this instruction.<sup>6</sup> The con-

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<sup>1</sup> Col. Recs., I., 649-656. <sup>2</sup> Ibid., III., 115-116. <sup>3</sup> Ibid., III., 154-155.

<sup>4</sup> Ibid., III., 430.

<sup>5</sup> Ibid., V., 1118.

<sup>6</sup> In Virginia, in 1708, Governor Jennings reported that in the past nine years the Royal African Company had imported into Virginia 679 negroes, while from other sources had come 5928. The reason for this state of affairs is not given (cf. N. C. Col. Recs., I., 693). About the same time Brickell wrote that the planters saved most of their coin "to buy negroes with in the islands and other places" (Nat. Hist. of N. C., p. 45; also p. 272).



dition of importation may be seen from the fact that in 1754 only nineteen negroes were entered in the custom-house at Bath, and that the average number brought into Beaufort for the preceding seven years was seventeen.<sup>1</sup> In 1772 Governor Martin estimated that the total number imported into the province in eight months did not exceed 200.<sup>2</sup> These numbers refer undoubtedly to the number brought into the province through its custom-houses. The inefficient naval officers at the ports doubtless let a considerable number more than these come in without any duties paid, and there was always a number brought down by the land routes from Virginia. There is reason to believe that the latter route was the way by which most of the slaves came.

*Distribution of Slaves.*—Mention has already been made of the three movements of immigration which carried slaves into the colony. The eastern part of the country, speaking broadly, was strongly slaveholding. The western part was, for a time, almost free territory, and never had as many slaves as the east. This was due to conditions of settlement. Those persons who settled the west were used to tilling their own lands, expected to till them, and found it for a while more profitable to till them. Those in the east came mostly from eastern Virginia, where they had learned the value of slave labor and started with the idea that slaves they must have. This condition is well illustrated in a letter from Governor Dobbs in 1755. He is speaking of the people of the country and declares that above all they suffer from the lack of pious clergymen and good schools. This occasioned idleness, thriftlessness, and ignorance, "which, with the warmth of the climate and plenty they have of cattle and fruit without labour, prevents their Industry, by which Means the Price of Labour is very high, and the Artificers and Labourers being scarce in Comparison to the number of Planters, when they are employed they won't work half,

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<sup>1</sup> Col. Recs., V., 144<sup>h</sup>, 145, and 314. It is likely that an additional number were brought in without paying duty. The custom-houses were very loosely kept.

<sup>2</sup> Ibid., IX., 279.

scarce a third part of work in a Day of what they do in Europe, and their wages being from 2 Shillings to 3, 4, and 5 Shillings per diem this Currency, the Planters are not able to go on with Improvements in building or clearing their Lands, and unless they are very industrious to lay up as much as can purchase 2 or 3 Negroes, they are no ways able to cultivate their Lands as Your Lordships expect. . . . Young or new planters could not venture to take up Lands, and those who are rich can't get hands to assist them to cultivate, until they can buy Slaves and teach them some handicraft Trades."<sup>1</sup> This condition of affairs he declared was still an obstacle to progress in 1764. It was a natural outgrowth of slavery, and it was the price that the South always paid to her "peculiar institution."

The numerical contrast in the slave populations of the two sections is very great. In 1767 there were in the sixteen counties which we may call eastern, that is to say those that were not settled by people who came the western route, 10,238 white, as against 12,307 black, taxables. By the method of estimating which we have already used, this would be a total population of 41,000 whites and 21,500 blacks. In the thirteen counties which we may call western there were by the same returns 19,448 white, and 9092 black, taxables. This would be a total population of about 77,000 whites and about 16,000 blacks.<sup>2</sup> The greatest excess of slaves over white people was in Brunswick County, where there were 224 white, and 1085 black, taxables,<sup>3</sup> altogether about 900 whites to about 1800 blacks. Reverend John McDowell, in speaking of the parish which made up this county, said, in 1762: "We have but few families in this parish, but of the best in the province, viz., His Excellency the Governor, His Honor the President, some of the honorable Council, Col. Dry, the Collector, and about 20 other good families, who have each of them great gangs of slaves. We have in all

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<sup>1</sup> Col. Recs., V., 315, and VI., 1026.

<sup>2</sup> Cf. Col. Recs., VII., 145, 288, 539 and 540. <sup>3</sup> Ibid., VII., 539.

about 200 families.”<sup>1</sup> Against this eastern country it is well to place Rowan in the west. In 1754 it had only 54 black, against 1116 white, taxables.<sup>2</sup> How many it had in 1767 does not appear, since its black and white taxables are not distinguished in the returns.

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<sup>1</sup> Col. Recs., VI., 729-730 and 985-986. Brunswick was erected into a county in 1764.

<sup>2</sup> Ibid., V., 152.

## CHAPTER II.

## THE LEGAL STATUS OF SLAVERY.

The first law of North Carolina, if such it may be called, in regard to slavery was a clause in the Fundamental Constitutions. It ran: "Every freeman of Carolina shall have absolute power and authority over negro slaves of what opinion and religion soever."<sup>1</sup> This clause but expressed the legal concept of the time in regard to the rights of the American slave-owners. It was enforced not so much because it was a part of the Fundamental Constitutions, as because it fitted in with what was in the other colonies already good custom. It recognized the slave as a chattel. He could, according to the popular theory, be bought, bred, worked, neglected, marked, or treated in any other respect as a horse or a cow.

The earliest known law passed in North Carolina on the subject of slavery was included in the Revision of 1715.<sup>2</sup> This revision comprised as many of the old laws as were in force in 1715. The necessity of the case would have demanded a law fixing the status of slaves and servants at an early date, and it is probable that this law, or its chief features, was in force at a much earlier date than 1715. It was most likely in force earlier than 1699, since in that year we find a law which contained a provision in regard to harboring runaways<sup>3</sup> similar to one in the law of 1715.

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<sup>1</sup> Col. Recs., I., 204.

<sup>2</sup> These laws are preserved in manuscript in the State Library, Raleigh, N. C., and the one in question may be found on pages 269-290 of that volume. It appears as chapter 46.

<sup>3</sup> Col. Recs., I., 514.



*The Slave in Court.*—By this law a slave could not be tried in the same court that was open to a freeman. If he had offended seriously he must be tried before any three justices of the peace and three additional freeholders who were also slaveholders, or the major part of them, and who lived in the precinct in which the offence was committed. The tribunal thus constituted was to have power to try the case according to its best judgment, to give sentence of life or member, or other corporal punishment, and to order the execution of the sentence by the regular officers of the law. It was to meet at such a time as should be appointed by that justice of the peace whose name came first in the commission of the peace for the precinct.<sup>1</sup> The reason for this separate court, says Dr. Hawks, was that the slave might be tried at once, so that his master might not lose his labor while waiting for the time for the regular court to sit.<sup>2</sup> If a slave should be executed by order of the court, or if he should be killed while resisting arrest, it was the duty of this court to ascertain his value and to give a certificate of that valuation to the owner. This entitled the owner to a poll-tax on all the slaves in the government in order to reimburse him for his loss.

This act was in force until 1741, when a new "Act Concerning Servants and Slaves"<sup>3</sup> was passed. The provisions for the trial of a slave were thereby slightly altered. An offending slave was to be committed to jail by any justice of the peace as soon as there appeared good reasons for suspecting him. The sheriff was then to summon two justices and four freeholders who were slave-owners. These were to meet at the county court-house to hear all charges against the slaves. All the justices of the peace in the county who were slave-owners might sit on the bench if they were present at the trial, though not all could be summoned.

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<sup>1</sup> In 1740 John Swann and John Davis were removed from their commissions of the peace in New Hanover County for refusing to act at the trial of a negro (Col. Recs., IV., 460).

<sup>2</sup> History of North Carolina, II., 205.

<sup>3</sup> Laws of 1741, ch. 24.

This court was given a broader jurisdiction than that possessed by the older tribunal. It was directed to "take for evidence the confession of the offender, the oath of one or more credible witnesses, or such testimony of negroes, mulattoes, or Indians, bond or free, with pregnant circumstances as to them shall seem convincing, without solemnity of jury; and the offender being then found guilty, to pass such judgment upon the offender, according to their discretion, as the nature of the offence may require; and on such judgment to award execution." The master of the slave, or his overseer, could appear at the trial in his behalf, but in defending him he was to see "that the defence do not relate to the formality in the proceeding of the trial" (sects. 48-52). This law remained on the statute book throughout the colonial period.

It was a part of the universal law of Southern slavery that a slave should not testify against a white person in the courts. In North Carolina this principle seems to have been recognized from the first; for Tobias Knight, when he was charged in 1719 with complicity with Teach, the pirate, urged in his defence that the prosecution had introduced the evidence of four negro slaves, "which by the laws and custom of all America ought not to be examined as evidence, neither is there [*sic*] evidence of any validity against any white person soever."<sup>1</sup> This seems to have been at that time a matter of the unwritten law of the colony, rather than a colonial enactment. At any rate, the first time we encounter such a provision in the North Carolina laws is in 1746.<sup>2</sup> It was then declared that "all negroes, mulattoes, bond and free, to the third generation, and Indian servants and slaves, shall be deemed to be taken as persons incapable in law to be witnesses in any case whatsoever, except against each other." This feature of the law of evidence was renewed from time to time till the Revolution,<sup>3</sup> and indeed it continued till the abolition of slavery.

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<sup>1</sup> Cf. Col. Recs., II., 345.

<sup>2</sup> Laws of 1746 (3d session), ch. 2, sect. 50.

<sup>3</sup> See Laws of 1762, ch. 1; 1768, ch. 1; and 1773, ch. 1.

The denial of the privilege of testifying in court has been regarded as a great hardship to the negro. Inasmuch as it affected the more advanced of the slaves of the period just before the Civil War, this is a just contention; but it is well to remember that in the days when slavery was introduced into America there were two good reasons, as the whites thought, why the negroes should not give evidence against a white man. 1. They were in the lowest moral condition. Those who have not examined contemporary testimony on the subject will not easily imagine how the negroes lived. They were naturally ignorant, superstitious, and filled with intense hatred for those who made them slaves and held them as such. They were bestial, given to the worst venereal diseases and they had little or no regard for the marriage bond. Indeed, as Brickell says, marriage sat very lightly on them.<sup>1</sup> They were unchaste and mostly unreliable. 2. The Africans were pagans. Those few who professed conversion to Christianity could not have had any clearly defined idea of Christian principles. The mass who were unconverted could have very little regard for the Christian oath. How could such persons, argued the colonists, be allowed to imperil the lives of Christian whites? That such testimony should not be received was quite in keeping with the spirit of the times.

Not satisfied with denying them the right to testify against the whites, the Assembly, in the law of 1741 (sect. 50), enacted that if any negro, mulatto, or Indian, bond or free, be found to have testified falsely, he should without further trial be ordered by the court to have one ear nailed to the pillory and there to stand one hour, at the end of which time that ear should be cut off; then the other ear should be nailed to the pillory, and at the end of another hour be cut off as the former. Finally the luckless fellow received thirty-nine lashes on his bare back, well laid on. This, it must be confessed, was vigorous enough to reach the conscience even of a pagan. The chairman of the court before

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<sup>1</sup> Brickell, *Natural History of North Carolina*, p. 274.

which the slave was tried was, however, instructed to warn the witnesses in the outset against giving false testimony, unless indeed such witnesses were Christians (sect. 51).

If a slave should lose his life while engaged in some affair of the colony's responsibility, the master would feel that he should not have to lose the value of this piece of property. He might also be disposed to impede the action of the law. To obviate this it was provided that any master who had lost a slave in dispersing a conspiracy, in taking up runaways, or in the execution of an order of court, should have a claim against the public, to be allowed by the Assembly. If, however, a third party should kill a man's slave, the owner would have no other recourse than an action for damage to property.<sup>1</sup> In 1758 the Assembly decided to try an experiment. They were dissatisfied with existing conditions. Paying for executed slaves they considered a hardship, and they thought that they had come upon a plan which would save the lives of the slaves and still act as a deterrent from further crimes. They enacted that except for rape or murder no male slave who had committed a crime which was ordinarily punished by death should suffer death for the first offence; but that on due conviction such an offender should be castrated, the sheriff to be allowed for the operation twenty shillings to be paid by the public. The court must fix the value of the slave before the execution of this sentence, so that if it should be the cause of his death there might be no dispute as to the value to be paid his master. Three pounds were allowed by the public for the curing of the slave's wounds. For the second offence death might be the penalty. At the same time it was ordered that no owner should recover more than sixty pounds for a slave executed or killed in outlawry.<sup>2</sup> This experiment to relieve the government of paying for executed negroes did not, it seems, prove successful. It was put into operation in at least one instance,

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<sup>1</sup> Laws of 1741, ch. 21, sects. 54 and 55.

<sup>2</sup> Laws of 1758, ch. 7.



in 1762.<sup>1</sup> Why it was not continued we do not know. It would be charitable to suppose that the public mind revolted at its disgusting severity. At any rate, in 1764 a law was passed which repealed the provision in regard to castration, and raised to eighty pounds the limit at which slaves executed or killed in outlawry might be valued.<sup>2</sup> The next attempt in this line was a bill introduced in 1771, which provided that the several counties should tax themselves to pay for slaves executed within their borders. Such a measure would throw the expense on the slaveholding counties, and was evidently regarded as a relief by counties that had few slaves. It was introduced by Thomas Polk, of Mecklenberg County, where there were very few slaves. It passed the lower house, but was rejected on the second reading in the Council.<sup>3</sup> The same measure came up again in the Assembly of 1773, but it met the same fate.<sup>4</sup>

*Runaways.*—One of the commonest delinquencies on the part of the slaves was running away. Used to the forest life in Africa and accustomed to much severity on the farms of the frontier planters, it was no great hardship to them to live for months or years in camp in the swamps.<sup>5</sup> It seems, too, that there were not wanting at that time freemen who would help the runaways. The law against the practice was very severe. The act of 1715, which has already been cited more than once, provided that any person who should harbor a runaway slave more than one night should pay to the owner of the slave ten shillings for each twenty-four hours he had been kept in excess of the first night. He was also to pay to the owner any damage the latter might be adjudged to have received by reason that the former had harbored the runaway (sect. 6). No master, it was further enacted,

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<sup>1</sup> Col. Recs., VI., 742.

<sup>2</sup> Laws of 1764, ch. 8.

<sup>3</sup> Col. Recs., VIII., 355, 356, 403, 405 and 409.

<sup>4</sup> Ibid., IX., 404 and 418.

<sup>5</sup> The Dismal Swamp was a great place for these runaways. Elkanah Watson found them there in 1777, and they seem to have been there much earlier. See Watson's Journal, Wake Forest Student, December, 1895, p. 85.

should allow a slave to go off his plantation—except he be in livery, or waited on a master or mistress, or accompanied a white servant—unless he first gave the said slave a ticket stating the place from which, and the place to which, the slave was going. Five shillings was the penalty for violating this feature of the law (sect. 7). All persons were commanded to do all they could to arrest slaves off their master's plantations without the proper tickets, and in fact to arrest any suspected runaways or any slaves away from their homes with arms in their possession. A slave so arrested was to be taken before a neighboring magistrate, who might, at his discretion, order corporal punishment. He who arrested such a slave was to deliver him to the master, if he were known, otherwise to the provost marshal of the colony,<sup>1</sup> and receive pay for his trouble from either the one or the other at a rate specified by law (sect. 8).

A slave that thus came into the hands of the provost marshal must be kept safely. If necessary, he was confined and the public paid for his support; but if he was not unmanageable, the provost marshal might work him to pay for his keep. A slave thus in custody must be advertised by proclamation in every precinct in the colony at the next three courts after the date of arrest. The jails in the colony were at that time notoriously insecure, and provision was made that if the slave escaped from jail the provost marshal should not be held accountable unless it could be shown that the prison was secure, or that the marshal had connived at, or aided in, the escape. Any person who should kill a runaway slave "that hath lyen out two months," while trying to apprehend him, was not to be held accountable for it if he would swear that he did the killing in self-defence (sect. 8).

Any one who will examine the laws passed from time to time on any one feature of slavery will be able to

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<sup>1</sup> The provost marshal was the high sheriff of the county. In each precinct there was a deputy marshal. When the precincts were changed into counties the latter officers were thenceforth called sheriffs.

understand with ease the whole progress of the public mind in the South in reference to the slaves. The whites started with the idea that the negroes must be kept from rebelling. They erected certain restraints on actions which looked like rebellion, or which might possibly lead to it. As time went on the negroes learned how to evade these restraints or to find new lines, which it was feared would lead to liberty. As these avenues were seen, new laws were passed which closed them to the unfortunate blacks. It was not the harshness of the dispositions of the whites, but the inevitable logic of their first attitude on the matter that made them draw cord after cord around the black man to make his bondage secure.<sup>1</sup>

In nothing is this process seen more clearly than in the law in reference to runaways. The slaves found means of evading the law of 1715 in regard to certain minor points. The law of 1741 re-enacted the law of 1715 and added provisions to cut off these avenues of evasion. It was enacted that the person who tempted a slave to run away should be fined, and the fine for harboring a runaway was increased. If the person so fined could not pay, or did not pay, the fine, he was to be sold by the court for such time as was necessary to get money enough to pay it (sect. 25). This provision referred undoubtedly to freemen, and the inference is that it aimed at the free negroes and poor whites, most of whom had once been bonded people themselves. That they should have tried to screen the fugitive negroes is not unlikely. Any one charged with attempting to steal a slave and to take him out of the province was to be bound over to court on the oath of one reputable witness, and if he was lawfully convicted he should pay the owner the sum of twenty-five pounds. If unable to pay this amount he was to restore the stolen slave and to serve the owner five years. If, however,

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<sup>1</sup> Brickell, who wrote with an eye to attract immigrants, said that the planters continually put into force all laws against the slaves "to prevent all opportunity they might lay hold of to make themselves formidable" (Natural History of North Carolina, p. 276).

he had already sent the slave out of the colony he was to be considered guilty of felony, and might accordingly be condemned to lose his lands, and also his life (sect. 27). To insure that he who took up runaways should be paid for his services, it was ordered that if a slave were taken ten miles from his master's plantation the churchwardens should pay the cost of taking him up and then collect the amount from the owner (sect. 28). If a runaway could not speak English, or refused to give his master's name, the sheriff was to advertise him for two months at the court-house door, and at each church in the county, or at any other convenient places (sect. 29). If at the end of a month the owner was still unknown, the sheriff<sup>1</sup> was to deliver the slave to the next constable, and he in turn to the next, and so the luckless captive was passed from constable to constable till he came at last to the central jail of the province (sect. 30). The cost of all this was to be paid by the owner if he ever appeared, otherwise the slave was to be hired out to some person approved by the county court or by two justices of the peace (sects. 31 and 32). To distinguish such a slave from others, as well as to mark him so that he would not care to run away, there was placed around his neck an iron collar on which were the letters P. G., meaning, presumably, "Public Gaol" (sect. 33).

Lest all this should delay punishment so long that the slave would not be properly impressed, the justice of the peace before whom he was first taken was to whip him as he thought best, not to exceed thirty-nine lashes (sect. 34). To get the slave to the central jail was not an easy matter; constables gave various excuses. To facilitate their journeying, the keepers of ferries were ordered to give immediate passage to constables thus engaged; and the churchwardens were directed to pay the ferriage and to collect the same as the other costs (sect. 37). Runaways that were

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<sup>1</sup> At this time the older precincts had been changed into counties, and the provost marshal, with his deputies, had given place to a sheriff for each county.



thought to belong to another colony must be advertised in the Virginia and the South Carolina Gazettes (sect. 39). When slaves had gone away to the swamps, and were issuing thence to destroy hogs and other stock, there was nothing to be done with them but to make them outlaws. The law of 1741 did just that. It directed that in such cases two neighboring justices of the peace should issue a proclamation calling on such slaves to return to their masters. If they did not return at once, any person meeting them might lawfully kill them, "without accusation of any crime for the same"; and for the slaves so killed the masters should be repaid by the public (sects. 45 and 46). When runaways were taken it was the custom to put yokes around their necks, and these they were forced to wear until "they gave sufficient testimony of their good behaviour to the contrary."<sup>1</sup>

*The Slave's Right to Hunt.*—Severe restrictions were put on the slave in regard to his right to hunt. Hunting was the gentleman's pastime, and it may be that the idea that it was not becoming to allow slaves to engage in it had something to do with the passing of these laws. Still it cannot be doubted that the chief reason was the desire to keep arms out of the hands of the negroes. In this, as in so many other features of these laws, the whites were looking to the possibility of an insurrection. Carrying a gun also gave the slave an opportunity to kill hogs or other stock in the woods, and this it was desired to prevent.

The first law on this subject was made in 1729.<sup>2</sup> In that year the Assembly, while passing an act "For Preventing People from driving Horses, Cattle, or Hogs, to other Persons' Lands," and for other purposes, incorporated a clause which forbade a slave to hunt with dog, or gun, or any other weapon, on any land but his master's, except in company with a white man. The penalty for this offence was fixed at twenty shillings, to be paid by the master of the slave to the owner of the land on which the slave had been found hunt-

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<sup>1</sup> Brickell, *Natural History of North Carolina*, p. 270.

<sup>2</sup> *Laws of 1729*, ch. 5, sect. 7.

ing. The manner in which this clause was introduced indicates that it was passed chiefly to protect the stock. The law of 1741 took up this subject also. It provided that any one who found an armed slave hunting or ranging in the woods without the written permission of his master should take him before the nearest constable, who, without further process, should give the said slave twenty lashes and then send him to his master. The master should pay the apprehender for his trouble (sect. 40). This clause, it was seen, might bear severely on the man who relied on game for an article of diet. It was accordingly added that this law should not prevent a man from keeping one slave on each of his plantations to take game for his family's use and to drive away such animals as were destroying stock. Any slave who was thus set apart as his master's hunter must carry with him a certificate signed by his master, and countersigned by the chairman of the county court, stating that he had the right to carry a gun. If he were caught without this certificate he was whipped (sects. 41 and 42).

These were, without question, harsh laws, and they stood for a severe spirit of repression on the part of the dominant Assemblymen. Their very severity seems to have partly defeated them. It is pleasant to know that the spirit of the law was here harsher than the practice of the people. This we know from the preamble of an act passed in 1753.<sup>1</sup> Among other things it declared that "the remedy in the said act [the law of 1741] provided has proved ineffectual to restrain many slaves in divers parts of this province from going armed, which may prove of dangerous consequences." The truth about the matter is most likely that the good nature of the whites revolted at the harshness of the law when they were called on to apply it in individual cases, and that as a result many negroes who were known to be trustworthy carried guns and were not apprehended. The Assembly, looking at the affair from the standpoint of theory, took no such view. They now passed a law in which the

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<sup>1</sup> Laws of 1753, ch. 6.

master's responsibility was taken into account. It enacted that no slave should hunt in the woods with a gun unless his master would give bond for his good behavior; and that if any one should suffer an injury at the hands of such a slave he could recover the amount of the damage from the master's bondsmen (sect. 2). No slave should carry a gun on a plantation on which no crop was planted, and only one should carry a gun on a cultivated plantation; "and the master, mistress, or overseer of any slave with whom shall be found any gun, sword, or other weapon contrary to the true intent and meaning of this and the before-recited act, shall forfeit and pay to the person finding the same the sum of twenty shillings proclamation money, . . . any punishment inflicted on the slave, forfeiture of the gun, sword, or other weapon notwithstanding; unless such master, mistress, or overseer shall by oath or other proof make appear that such a slave carrying a gun, sword, or other weapon was without their consent or knowledge" (sect. 3). In this way a master was held to a stricter account, and through him the slaves were probably better kept in hand.

It was also thought that the slaves should be watched more closely by the civil authority. To that end the courts, if they saw fit, were directed to divide the counties into districts and to appoint three searchers in each district. Four times a year, or oftener, these should search as privately as possible the quarters and places of resort of the slaves to find guns or other weapons. Any arms thus found they were to seize and have for their own use (sects. 4 and 7). This, it seems, was the first appearance in the State of the patrol, an institution which the slave eventually learned to dread perhaps next to the bloodhounds. It was also provided that a slave with no certificate from his master could not hunt with a dog, and any one who caught him violating this clause might kill the dog and have the slave whipped by the nearest magistrate, not exceeding thirty lashes (sect. 8).

An abuse by both whites and blacks was hunting at night with guns. Those who were so disposed might by that means

easily kill a hog or a cow and claim that it was an accident. To guard against this the Assembly in 1766 placed a fine of five pounds on any person hunting for deer at night.<sup>1</sup> This law was renewed in 1770,<sup>2</sup> and in 1773 it was amended so as to include slaves. It was then declared that if any slave were found hunting with a gun at night by firelight he should be arrested by the person so finding him, forfeit his gun to that person, and be carried to any justice of the peace of the county, who, on conviction, should give him "fifty lashes on his bare back, well laid on."<sup>3</sup> It was unlawful for any person to kill deer from January 15 to July 15. A law of 1738<sup>4</sup> declared that if within this time a slave should kill a deer by his master's commands, the master must pay a fine of five pounds. If he should "kill, destroy or buy" any deer during this time without his master's commands he should, on conviction before a justice of the peace, receive on his "bare back thirty lashes, well laid on"; unless some responsible person would become bound to pay five pounds in lieu of the whipping.

*The Slave's Right to Travel.*—The keeping down of the slaves involved a strict prohibition on any assembling or communicating at night with one another. In 1729 the matter was taken up by the lawmakers.<sup>5</sup> They then enacted that negroes traveling at night, or found at night in the kitchens of white people, should be thrashed, not to exceed forty lashes; and that the negroes in whose company they were found should each receive twenty lashes (sect. 8). No slave should at any time "travel from his master's land by himself to any other place, unless he should keep to the usual and most accustomed road," on penalty of receiving not more than forty lashes from him on whose land he might be found. "If any loose, disorderly, or suspected persons be found drinking, eating or keeping company with a slave in the night time" they should be arrested and made to give

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<sup>1</sup> Laws of 1766, ch. 18.

<sup>2</sup> Laws of 1770, ch. 10.

<sup>3</sup> Laws of 1773, ch. 18, sect. 3.

<sup>4</sup> Laws of 1738, ch. 10.

<sup>5</sup> Laws of 1729, ch. 5.



satisfactory account of themselves, or be whipped not more than forty lashes (sect. 7). This, however, was not to be construed to prevent a master from sending his negroes on business with a pass, or to obstruct the intermarrying of the slaves of neighboring plantations when they had received permission from their masters (sect. 9). This law remained in force until after the Revolution. So much did the white people fear that the negroes would plot insurrection if they could meet, that they forbade, as will be seen later on, the meeting of the slaves for religious purpose.

*The Slave's Right to Property.*—It probably occurred quite early to the owners of slaves to ask themselves what property a slave could own. If he were a chattel, a thing, how could he have a dominant relation over another thing? How the men of the seventeenth and eighteenth centuries in North Carolina answered this question we do not definitely know. We do know that at first they were lenient with their slaves on this subject. They allowed them to have cattle, and probably to cultivate small plots of ground for their own use. Later in this period they became more stringent and took away the right of holding cattle. The cause of this does not seem to have been any intention to carry to its logical sequence their idea of a slave's legal status. It arose rather from the thievishness of the negroes. Having stock of their own, it was easy for them to steal that of other people, to change the marks so as to make them conform with their own marks, and thus baffle punishment. This seems to have led to the several laws which gradually restrained the slave's right of owning property until it was finally extinguished altogether.

The first provision of this nature is found in the law of 1715. It restrained the slave's right to buy and sell, or even to borrow. It provided that whoever should sell or lend to a slave without the consent of the slave's master should forfeit treble the value of the amount of the trade or loan and be subject, in addition, to a fine of ten pounds, to be recovered by the master. That this was considered more a matter

of public safety than an act of justice to the master is shown by a further provision. If the master did not sue within six months after he knew of the transaction, anybody else might bring suit and recover the fine (sect. 9). The law of 1741 modified this by reducing the fine from ten to six pounds, and by providing that if the offender could not pay the fine he should be sold by the county court for a term sufficient to pay it.<sup>1</sup> This feature of the law was further amended in 1773 by an act that forbade keepers of ordinaries to sell liquors to slaves against the will of their masters.<sup>2</sup>

In 1741 the Assembly took up the matter of the stealing of stock by slaves. Thievish by nature, the African in America became especially expert in petty larcenies. He was the more impelled to it because he felt that he had worked to raise the stock and ought to have a full share. At the time of which we are now speaking it was enacted<sup>3</sup> that if any negro, Indian, or mulatto slave should kill any horse, cattle, or hogs without the owner's consent, or should steal, misbrand or mismark any horse, cattle, or hogs, he should have his ears cut off and be publicly whipped, at the discretion of the court trying the offence. For the second offence he should suffer death (sect. 10). The law of the same year, which we have already quoted so often, was more severe still. It provided that no slave should on any pretext raise hogs, horses, or cattle, and that all such stock as was found in the possession of slaves six months after the passage of this act was to be seized and sold by the churchwardens, one-half to go to the informer and the other half to go to the parish. This rigorous provision remained the law of the land from that time throughout the period which we have under consideration (sect. 44).

The slaves for their part seem to have been accustomed to allege that they stole because they were not properly fed. In some cases this was doubtless a true allegation. At least the Assembly seem to have thought as much; for in 1753

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<sup>1</sup> Laws of 1741, ch. 24, sect. 14.

<sup>2</sup> Laws of 1773, ch. 8, sect. 9.

<sup>3</sup> Laws of 1741, ch. 8.

they enacted that no man who had a slave killed in outlawry or executed by the order of a court could recover his value from the public unless he could make it appear that the said slave had been properly clothed, and for the preceding year had constantly received an allowance of one quart of corn a day (sect. 9). This was an insufficient ration, and an insufficient means of enforcing it was provided. To direct that the getting of it should depend on the liability of the slave to be executed or to become an outlaw was but a slight approach to justice. There ought at least to have been a plainly expressed injunction that this minimum ration should be given to each slave on pain of proper penalties. The same law further provided that if a slave who was not properly clothed and fed should be convicted of stealing from any man other than his master, the wronged man might recover damages from the owner of the thief. If we may believe Brickell, clothing of slaves was not an item of great expense to the masters. He says that children wore little or no clothing in the summer, and that many young men and young women worked in the fields naked but for cloths around their loins.<sup>1</sup>

*The Slave's Right to Life.*—The King seems to have been more inclined to compassion towards the slaves than the Lords Proprietors. The latter in their Fundamental Constitutions had given the settlers absolute control over their negro slaves. So far as we know, this remained their attitude toward slavery as long as they held the colony. Burlington, the first royal governor, however, was instructed to endeavor to get a law passed "for the restraining of any inhuman severity which by ill masters or their overseers may be used towards their Christian servants and their slaves, and that provision be made therein that the wilful killing of Indians and negroes may be punished with death, and that a fit penalty be imposed for the maiming of them."<sup>2</sup> The same instruction was given to Governor Dobbs in 1754.<sup>3</sup>

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<sup>1</sup> Natural History of North Carolina, p. 276.

<sup>2</sup> Col. Recs., III., p. 106.

<sup>3</sup> Ibid., V., 1122.

He duly recommended it to the Assembly,<sup>1</sup> and a bill to that end was introduced. It passed three readings in the lower house, but was rejected on the third reading in the Council.<sup>2</sup> In 1773 William Hooper presented a bill to prevent the malicious killing of slaves. It passed both houses, but was rejected by the Governor, because "it was inconsistent with His Majesty's instructions to pass it, as it does not reserve the fines imposed by it pursuant to their direction."<sup>3</sup> The matter was taken up again in the next Assembly, and an *Act to Prevent the Wilful and Malicious Killing of Slaves* was successfully passed. It was the last law but one that was signed by the royal governor of North Carolina.<sup>4</sup>

Two of the sections of this act are so full of meaning that it is well to give them in full. They are:

"I. Whereas some doubts have arisen with respect to the punishment proper to be inflicted upon such as have been guilty of wilfully and maliciously killing slaves:

"II. Be it therefore enacted by the Governor, Council and Assembly, and by the authority of the same, That from and after the first day of May next if any person shall be guilty of wilfully and maliciously killing a slave, so that if he had in the same manner killed a freeman he would by the laws of the realm be held and deemed guilty of murder, that then and in that case such an offender shall, upon due and legal conviction thereof in the Superior Court of the district where such offence shall happen or have been committed, suffer twelve months imprisonment; and upon a second conviction thereof shall be adjudged guilty of murder, and shall suffer death without benefit of clergy."

It was also provided that if the slave that should be killed in this manner be not the property of the offender, the slayer shall pay to the owner the value of the slave, to be assessed by the Inferior Court of the county; provided, however, that this act should not extend to those who killed outlaws, or to

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<sup>1</sup> Col. Recs., V., 660.

<sup>2</sup> Ibid., V., 666 and 676.

<sup>3</sup> Ibid., IX., 398, 470, 663 and 664.

<sup>4</sup> Laws of 1774, ch. 31.



slaves who died under moderate correction, or to those who were killed while resisting their lawful masters. If this was all the relief that could now be granted to the slave, what must have been his rights in regard to his own life before this law was passed! It is impossible to fail to see that the last proviso, in that it gave a man the opportunity to allege that the killing had been done while the slave was resisting authority, or in process of moderate correction, went far toward annulling the whole law.

## CHAPTER III.

## THE RELIGIOUS AND SOCIAL LIFE OF THE SLAVES.

*Religion.*—There is no part of our subject on which we have more unsatisfactory records than on this. The earliest slaves in the colony, except in rare cases, were undoubtedly pagans. The people seem to have been content that they should have remained such. Indeed, if we may believe much contemporary evidence that has come down to us, the whites did not care very much if they themselves were pagans. In view of such circumstances it is not surprising that we are compelled to pass over as much of the seventeenth century as falls within our sphere of inquiry with but little comment on the slave's religious life.

Besides the indifference to religion on the part of the whites, there was another cause of the failure to convert the slaves. At first all the American colonists who had slaves had the notion that it was illegal to hold a Christian in bondage. The right to enslave a negro seems to have been based on the fact that he was a pagan. If such were the case, would not conversion enfranchise him? It was a matter of doubt in the minds of the planters, and since it was such they hesitated to allow their negroes to become converted.<sup>1</sup> It was in view of this feeling that the Lords Proprietors declared in the Fundamental Constitutions: "Since charity obliges us to wish well to the souls of all men, and religion ought to alter nothing in any man's civil estate or right, it shall be lawful for slaves as well as for others to enter them-

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<sup>1</sup> Maryland in 1671 passed the law stating that conversion or baptism should not be taken to give freedom to slaves. In 1677 an English court gave an opinion that converted slaves were "infranchised." See Brackett, *The Negro in Maryland*, 28, 29.

selves and to be of what church or profession any of them shall think best, and thereof be as fully members as any freeman. But yet no slave shall hereby be exempted from that civil dominion his master hath over him, but be in all things in the same state and condition he was in before.”<sup>1</sup> So important did they consider this feature that when they revised and abridged their constitutions in 1698 they kept it intact.<sup>2</sup> These Constitutions as a whole were never recognized as of binding force in North Carolina,<sup>3</sup> yet the people did not hesitate afterwards to claim its guarantees in points which were in their favor.<sup>4</sup> This guarantee might have been successfully used to protect the planters should a case have arisen over the point in question, and yet it left the matter with an element of risk in it that made the planters unwilling to allow the conversion of the negroes.

The condition that followed these circumstances is well seen from a statement of James Adams, a clergyman of the Established Church who was in the colony in 1709. He complained because the masters would “by no means permit [their slaves] to be baptized, having a false notion that a Christian slave is by law free.” A few of the negroes, he said, were instructed in the principles of religion, but he says plainly that they were not baptized.<sup>5</sup> The missionaries of the Society for the Propagation of the Gospel in Foreign Parts preached vigorously against this notion. Giles Rainsford, one of these missionaries, writing from Chowan in 1712, tells how he had had much trouble to induce one Martin to allow three slaves to be baptized.<sup>6</sup> Four years

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<sup>1</sup> Col. Recs., I., 204.

<sup>2</sup> Ibid., II., 857.

<sup>3</sup> See the author's “Constitutional Beginnings of North Carolina,” Johns Hopkins University Studies, Series XII., pp. 137, 138.

<sup>4</sup> Col. Recs., III., 452.

<sup>5</sup> Col. Recs., I., 720.

<sup>6</sup> Ibid., I., 858. In 1715 this same man writes: “I have baptized upwards of forty negroes in this and the neighboring government in the compass of this past year”; but there is no means of knowing how many of these were in North Carolina and how many were in Virginia (ibid., II., 153).

later Mr. Taylor, another missionary, reported that he had baptized five slaves, belonging to Mr. Duckinfield. He had also been preparing several others for baptism, but the opponents of the baptism of slaves had talked so much to the owner about it that he had declared that no more should be baptized until the British Parliament should pass a law providing that slaves should not obtain their freedom by baptism.<sup>1</sup> This was in Perquimons.

It is by no means a compliment to the North Carolinians of that day that this condition was improved so slowly. The lack of any efficient system of schools and of any even tolerable supply of ministers<sup>2</sup> left the intellectual and moral status very unpromising. That little progress should have come out of these conditions is but natural. From 1715 until 1735 we get only occasional information in the letters of the few missionaries in the colony. From these we see the total number of persons that were baptized. The proportion that were slaves is very small, but from 1735 it begins to grow slowly. In that year Mr. Marsden reports that during his stay at Cape Fear he has baptized "about 1300 men, women and children, besides some negro slaves."<sup>3</sup> In 1742 another missionary writes that in New Hanover County, where there were 1000 whites and 2000 slaves, he had baptized 307 of the former and 9 of the latter.<sup>4</sup> From this time information is abundant. A continued comparison of the reports shows a steady increase in the baptized slaves.<sup>5</sup> The improvement in the social conditions that came with a denser settlement and a wealthier community made for the advantage of the slave. The reports of the colonial clergy now show proportions something like the following: In a parish where there were very many slaves, 124 white and 40

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<sup>1</sup> Col. Recs., II., 332-333.

<sup>2</sup> Governor Everhard said in 1726 that there was not a clergyman in the province (*ibid.*, III., 48); and in 1735 there were only three (*ibid.*, IV., p. 7).

<sup>3</sup> *Ibid.*, IV., 13-14.

<sup>4</sup> *Ibid.*, IV., 605.

<sup>5</sup> Cf. *ibid.*, IV., 793, 794, 795, 925, 1315; VI., 225, 233, 265, 315, 711, 729, 735.



black infants are reported as baptized in 1765;<sup>1</sup> in another parish it is 124 whites and 46 blacks;<sup>2</sup> in still another, 331 white and 51 black children are baptized in sixteen months.<sup>3</sup> The same man reports in 1771 that from the preceding seventeen months he had baptized 383 white and 65 black children.<sup>4</sup> Another clergyman, Mr. Taylor, writes a year later that during the past thirteen months he had baptized in his own parish 174 whites and 168 blacks; 93 of the latter and only 2 of the former were adults. He adds that the slaves "seem to be very desirous of instruction in their duty." This was in Northampton County. When he went into Edgecombe County on a preaching tour, there being no minister there at that time, he did not have such success. He baptized in three days 129 white and 4 black infants.<sup>5</sup> There was at this time no opposition on the part of the masters to the christianization of the blacks, and it is likely that the number of them in any one parish who were converted was due chiefly to the clergyman there. It does not appear that all the clergymen were so much interested in the slaves as Mr. Taylor. If we remember that in this period there were very few clergymen in the province,<sup>6</sup> and that there were many slaves in the parish whose masters were Dissenters, and consequently had nothing to do with a minister of the Established Church, we shall see that after all the number of slaves reached by these clergymen was relatively small.

The method of instructing slaves in religion was entirely according to the notion of the clergyman, so far as we know: In the earliest days of the colony the masters did not put themselves to the trouble to try to convert their slaves; yet in the later period they seem to have been more interested. Mr. Taylor, in speaking in 1716 about the Duckinfield slaves,

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<sup>1</sup> Col. Recs., VII., 126.    <sup>2</sup> Ibid., VII., 424.    <sup>3</sup> Ibid., VII., 705.

<sup>4</sup> Ibid., VIII., 553.    <sup>5</sup> Ibid., IX., 326.

<sup>6</sup> Governor Tryon was thought to have done a great thing when he raised the number of parishes that had ministers from five in 1765 to twelve in 1767; yet it ought to be remembered that there were thirty parishes in the colony, and that he had not after all provided half of them with clergymen (ibid., VII., 103, 457, 540).

intimates that all the efforts made to convert them were made by himself. His own method of proceeding with the negro converts he recounts as follows: "I hope I took a method with the negro young man and the mustee young woman, whom I baptized, which will please the Society, which was this: I made them get our church catechism perfectly without book, and then I took some pains with them to make them understand it, and especially the baptismal covenant, and to persuade them, faithfully and constantly, to perform the great things they were to promise at their baptism, and ever after to perform to God; and then I caused them to say the catechism one Lord's Day and the other another Lord's Day before a large congregation, which they did both distinctly and so perfectly that all that heard them admired their saying it so well, and with great satisfaction to myself I baptized these two persons."<sup>1</sup> This method was assuredly as creditable to the missionary as to the converts, and it is evidence of a considerable degree of intelligence in the latter.

It was some time later before the public conscience was aroused to the duty of instructing the slave. In 1754 the instructions sent to Governor Dobbs directed him with the Council and Assembly to devise some sufficient means of converting the negroes to Christianity. This instruction was perhaps given to Governor Johnston, whose instructions we have not preserved, and it was renewed to Governor Tryon but nothing came of it. In 1760 Mr. Reed, the clergyman in Craven County, said that he would not baptize negro children unless their masters would become surety for their proper instruction in religion. The masters, he said, would not take the pains to do this.<sup>2</sup> Mr. Cupples, in Bute County, wrote in 1768 that when he had baptized a number of slave children, the engagements for some were made by their masters and mistresses, and for others by older slaves who had already become Christians.<sup>3</sup>

Whether or not these converted slaves fared better than the unconverted ones does not appear. They were most likely in

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<sup>1</sup> Col. Recs., II., 332.<sup>2</sup> Ibid., VI., 265.<sup>3</sup> Ibid., VII., 705.

the first instance slaves who waited around the dwellings of the whites, and who thus came under the religious influences of their masters or mistresses. As these were converted they would become missionaries to the field hands. Negroes were allowed to come into the dwellings of the whites in order to attend family worship,<sup>1</sup> and this must have had a softening influence on the relation between the two races.

Although the negroes were allowed to join any church they might fancy, they were not allowed to have a church organization among themselves. To have one was at once against the policy of the English Church and against the sentiments of the planters. At that time, as well as now, the negro knew but little distinction between church and secular organizations. The planters feared that negro churches might become centers of negro conspiracies. It was in this spirit that there was incorporated in *The Law Concerning Servants and Slaves*, revision of 1715, the following remarkable section: "Be it further enacted, That if any master, or owner of negroes, or slaves, or any other person or persons whatsoever in the government shall permit or suffer any negro or negroes to build on their or either of their lands or any part thereof any house under pretense of a meeting house upon account of worship or upon any pretense whatsoever, and shall not suppress and hinder them, he, she, or they so offending shall for every default forfeit and pay fifty pounds, one-half towards defraying the contingent charges of the government, the other to him or them that shall sue for the same."<sup>2</sup> This provision was aimed most likely at attempts to practice the negroes' old pagan rites as well as at the having of Christian worship. It seems to have become unnecessary, for it was left out of the law of 1741.

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<sup>1</sup> Dr. Hawks makes this statement on the authority of a MS. letter of Rev. Mr. Taylor, dated in 1718. This letter it has been impossible to find (Hawks, *History of North Carolina*, II., p. 229).

<sup>2</sup> Laws of 1715, ch. 46, sect. 18.

So far we have dealt with the religious life of the negro only as it regarded the Established Church in the colony. It would be interesting to know, also, his relation to the various dissenting churches of the province. Unfortunately, we know but little about these churches during the colonial period. With the exception of the Quakers, none of them, so far as we know, opposed the ownership of slaves, and all of them seem to have received the negroes into full connection when they had professed conversion.

The first religious body to worship in North Carolina was the Quakers.<sup>1</sup> From the first their attitude toward the slave was humane and brotherly. As early as 1671 George Fox advised Friends in Barbadoes to train their negroes in the Christian religion, to use them gently, and after a certain time of service to set them free. In company with William Edmundson he visited that island, and so labored with the masters there in behalf of the slaves that it was falsely reported that he was stirring up the slaves to insurrection. Both of these men came to North Carolina, and it is likely that they left the same views there in the minds of their co-religionists as they had taught in Barbadoes. The first time the subject of slavery came up in the North Carolina yearly meeting was in 1740, "when an epistle was received from the yearly meeting of Virginia concerning bearing arms, going to muster, and using negroes well." In 1758 the matter of "making provisions for negroes' meeting" was referred to a large committee; and it was agreed that meetings should be held at specified times for the benefit of the slaves at four designated places, and that a certain number of Friends should attend these meetings for the purpose of preserving good order. At the same time to the former queries which were regularly asked at the local monthly meetings, the answers of which were reported to the yearly meeting, there was added this query: "Are all that have negroes careful to use them well, and encourage them to come to meet-

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<sup>1</sup> See Weeks, *Church and State in North Carolina*, Johns Hopkins University Studies, Vol. XI., pp. 230-231.



ing as much as they reasonably can?" In 1768 the subject next came up. The Western Quarterly meeting could not satisfy themselves as to the true intent of a clause in the discipline in regard to the buying of slaves, and on that they appealed to the yearly meeting. That body appointed a committee on the matter, which duly reported that the discipline ought to be understood "as a prohibition of buying negroes to trade upon, or of those that trade in them; and that as the having of negroes is a burthen to such as are in possession of them, it might be well for the meeting to advise all Friends to be careful not to buy or sell in any case that can be reasonably avoided." The Western Friends were not satisfied at this, and at the next yearly meeting asked for the absolute prohibition of negro slavery. The matter was not decided at that meeting, and it was only in 1770 that it was definitely disposed of. In that year the query as to slaves was made to read: "Are all the Friends careful to bear a faithful testimony against the iniquitous practice of importing negroes, or do they refuse to purchase of those who make a trade or merchandise of them? And do they use those whom they have by inheritance or otherwise well, endeavoring to discourage them from evil and to encourage them in that which is good?"

This was taking very advanced ground, but two years later the yearly meeting went further still and agreed that thenceforth no Friend should buy a slave "of any other person than a friend in unity," except to prevent the separation of man and wife, or of parent and child, or for some other good reason, to be approved by the monthly meeting, and furthermore, that no Friend should sell a slave to any one who was used to buying or selling slaves for gain. About the same time the Standing Committee formally declared its views on the slave trade in the most vigorous language. They said:

"Being fully convinced in our minds and judgments, beyond a doubt or scruple, of the great evil and abomination of the importation of negroes from Africa, by which iniquitous practice great

numbers of our fellow-creatures with their posterity are doomed to perpetual and cruel bondage without any regard to their natural right to liberty and freedom, which they have not forfeited through any act of their own or consent thereto, but by mere force and cruelty—we are impressed with abhorrence and detestation against such a practice in a Christian community; for experience makes it fully manifest that instead of their embracing true religion and virtue in exchange for their natural liberty, they have become nurseries of pride and idleness to our youth—in such a manner that morality and true piety are much wounded where slave-keeping abounds, to the great grief of true Christian minds.

“And therefore we cannot but invite our fellow-subjects, and especially the Representatives of North Carolina (as much as lies at their door for the good of the people and prosperity of the Provinces), to join with their prudent brethren, the Burgesses of the colony of Virginia, in presenting an address to the throne of Great Britain, in order to be as eyes to the blind, and mouths to the dumb; and whether it succeed or not, we shall have the secret satisfaction in our own minds of having used our best endeavors to have so great a torrent of evil effectually stopped at the place where it unhappily had permission to begin.

THOMAS NICHOLSON,	JOHN SYMONS,
CALEB TRUEBLOOD,	JOHN SANDERS,
RALPH FLETCHER,	[and fifteen others].”

At the same time the committee wrote a letter to the London Friends expressing their approval of an address against the slave trade which the Virginia Assembly was about to present to the king, saying that they had spoken of the matter to some North Carolina Assemblymen, and that they hoped to get a like petition from that colony. They also referred to a law of the latter colony which restricted emancipation to cases of meritorious conduct, by which “such Friends as desire to liberate their slaves from principles of justice and Christianity are under a great difficulty.” Thus while the king was giving instructions to his governors to allow no act to pass the Assembly to prohibit the slave trade, the Friends were forming their views to ask that it should be discontinued.

None of these declarations had gone so far as actual emancipation. It was but two years later, 1774, when that matter was destined to come up. Thomas Newby becoming dissatisfied with owning slaves, brought the matter before the

yearly meeting. It was decided "That all Friends finding themselves under a burden and uneasiness on account of keeping slaves may set them at liberty by applying to the monthly meeting." Persons were also to be appointed to prepare instruments of writing suitable for emancipation, and to decide whether or not those whom it was proposed to free could support themselves. In the same year Thomas Nicholson was permitted to publish "Liberty and Property," a pamphlet regarding a change in the law of emancipation.

One step farther was taken before the limits of our subject were reached. In the yearly meeting of 1775 the Western Quarter again brought up the query respecting slaves. They desired such changes to be made "as would relieve some distressed minds." The committee to whom the matter was referred found that it could be settled only by the prohibition of buying or selling slaves without the consent of the monthly meetings, and, loth to act, returned the affair to the meeting as too weighty for them. The meeting then took it up and ordered: "That Friends in unity shall neither buy nor sell a negro without the consent of the monthly meeting to which they belong." The succeeding year the subject was again brought up, this time by the Eastern Quarter. After much deliberation, and a most earnest desire to settle the matter in the spirit of love, it was the "unanimous sense of the meeting that all the members thereof who hold slaves be earnestly and affectionately advised to clear their hands of them as soon as they possibly can; and in the meantime that no member be permitted to buy or to sell any slaves, or hire any from those who are not of our Society." Any one persistently violating this decision was to be "disowned as in other offences against the Church." Apart from its remarkable significance as being the culmination of several steps towards the abolition of slavery by the Friends, this action is most noteworthy for its display of the harmonizing power of the Quaker principles. For several years these people had had a disagreement over this question. It had been settled time after time only to be reopened. Step by step

the advocates of slavery had been pushed back. Finally they were defeated. What did they then do? They "were able very affectionately to express their sentiments" and to make the decision unanimous. It was reserved for this little meeting of simple Friends to show the world that the question of slavery could be debated and decided without either side surrendering itself to a passion. In this respect it was greater than the Congress of the United States.<sup>1</sup>

Thus did the Friends gradually come up to the position of entire abolition, giving themselves up to the cause in 1776, the year in which the great war for national freedom was begun. With the balance of the story we may not deal here. It is sufficient to say that the Society had committed itself to the cause of freedom, and that in so doing it had started the first movement in that direction in the history of the province.

The Baptists came into North Carolina at an early date. By the middle of the eighteenth century they had become strong in the central and eastern part of the upper tier of counties.<sup>2</sup> We know but little about them, however, for this early period. They seem to have received negroes into church fellowship with readiness. Mr. Barnett, a missionary of the English Church, said that they allowed negroes to speak at their meetings.<sup>3</sup> Their kinder feeling for the slaves is further shown by a reply of the Kehukee Baptist Association to a question asked in 1783 in regard to the duty of a master toward his slave who refused to attend family worship. The answer was: "It is the duty of every master of a family to give his slaves liberty to attend the worship of God in his family, and likewise it is his duty to exhort

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<sup>1</sup> For these facts on the relation of the Quakers to slavery the author is indebted to "A Narrative of Some of the Proceedings of the North Carolina Yearly Meeting on the Subject of Slavery within its Limits, 1848." This is a rare pamphlet, only one copy of which he has been able to hear of. That has been kindly furnished to him by the Library of Guilford College, North Carolina. See pp. 1-12.

<sup>2</sup> Col. Recs., III., 48.

<sup>3</sup> Col. Recs., VII., 164.



them to it, and to endeavor to convince them of their duty; and then to leave them to their own choice.”<sup>1</sup> Although this opinion was given in the aftermath of the Revolution, it no doubt voiced a spirit which had been in existence for some time previous.

There were many Presbyterians in the province, but unfortunately we have no evidence as to their relation to slavery. They probably did not materially differ from the members of the Established Church in that regard. Along with these ought to be put a considerable number of Lutherans and members of the Dutch Reformed Church.<sup>2</sup> The Methodists, whose introduction into the South was so closely connected with the religious life of the slaves, came so late into the State that they do not properly fall within the period with which we here have to deal.

*Social Life.*—Mr. Taylor, the missionary, writing in 1719, gave the North Carolina slaves an excellent reputation. He said of the Duckinfield slaves that they “were as sensible and civil and as much inclined to Christianity and things that are good as ever I knew any slaves, any slaves in this place, wherever I have been, and indeed so are the slaves generally in this province, and many of the slaves of this country, I am persuaded, would be converted, baptized, and saved, if their masters were not so wicked as they are, and did not oppose their conversion, baptism, and salvation, so much as they do.” It is likely that Mr. Taylor’s success in teaching the catechism to the two Duckinfield negroes had made him a little too hopeful of the race. It is also probable that the negroes he here came into contact with were superior to the average negro of the country.

Brickell, writing about 1731, probably came nearer the truth. From what he says we may divide the negroes in the colony into two classes: (1) Those who had recently been brought from Guinea, and (2) those who had been reared in

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<sup>1</sup> Biggs, History of the Kehukee Baptist Association, pp. 59-60.

<sup>2</sup> Bernheim, The German Settlements and the Lutheran Churches of the Carolinas. Cf. pp. 148 and 235.

the colonies. The latter were much more manageable. This was because of training among Christians, "which," he said, "very much polishes and refines them from their barbarous and stubborn natures."<sup>1</sup> The former often rebelled. As soon as they rebelled they would take refuge in the swamps, whence they would issue to commit depredations on the property of the whites. Such fugitives usually made themselves very much dreaded on account of their cruel and treacherous dispositions. They had, however, one foe in the forests. The Indians, he said, had a natural and irreconcilable hatred for the negroes and delighted in torturing them. When they would meet runaways in the woods they would attack them vigorously, either killing them or driving them back to the whites.<sup>2</sup> The price of negroes ranged from fifteen to twenty-six pounds sterling, varying according to age, health and disposition.<sup>3</sup> The amount which the Assembly fixed as the maximum price to be paid for executed slaves was eighty pounds, proclamation money.<sup>4</sup>

The intermarriage of slaves was a matter of little ceremony. The masters of the contracting party must first consent to the union. That being arranged, the groom sought his bride, offered her some toy, as a brass ring, and if his gift were accepted, the marriage was considered as made. If the couple separated the present was always returned. This occurred often, at times against the will of the parties. If the women bore no children in two or three years, says Brickell, "the planters oblige them to take a second, third, fourth, fifth, or more husbands or bedfellows—a fruitful woman amongst them being very much valued by the planters and a numerous issue esteemed the greatest riches

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<sup>1</sup> Brickell, *Natural History of North Carolina*, p. 272.

<sup>2</sup> *Ibid.*, p. 273.

<sup>3</sup> In Virginia in 1708 the price was, according to Jennings, "20 to 30 pounds a head for those sold by the [African] Company, and from 30 to 35 pounds a head for the like kinds sold by separate traders, who in general have sold theirs at a higher rate than the Company." *Col. Recs.*, I., 693.

<sup>4</sup> In 1774 we find a Congo negro offered for sale in Halifax for £140 colonial currency. *Ibid.*, IX., 826-827.

in this country." The children belonged to the owner of the mother, and the planters took pains to bring them up properly. The slaves showed great jealousy among themselves on account of their wives or mistresses. With such money as they could pick up they bought bracelets, toys, and ribbons for the women.<sup>1</sup>

The marriage of a white person and a negro was from the first considered exceedingly undesirable. The law of 1715, already cited, provided that no white man or white woman should marry any negro, mulatto or Indian on penalty of fifty pounds, to be collected of that one of the contracting parties who should be white. It also stipulated that any clergyman or other person who should officiate at such a marriage should also be liable to a fine of fifty pounds, one-half to go to the informer and one-half to go to the public (sects. 15 and 16). Explicit as was this law, it did not succeed in preventing such unions. The records show that two persons were indicted within two years for performing such a marriage ceremony. In one case the suit was dropped;<sup>2</sup> in the other case the clergyman went before the Chief Justice and confessed, as it seems, of his own accord.<sup>3</sup> This was a year after the occurrence and no action was taken thereon at that term of the court. Wherever these unions occurred the whites who were parties to them were of the lower class. In 1727 a white woman was indicted in the General Court because she had left her husband and was cohabiting with a negro slave. The case was referred to the precinct court for trial. It came, probably, under the law against fornication and adultery.<sup>4</sup> So far as general

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<sup>1</sup> Brickell, *Natural History of North Carolina*, pp. 272-275.

<sup>2</sup> Col. Recs., II., 591, 594, 602.

<sup>3</sup> In this case it seems that the clergyman confessed judgment in order to save himself from one-half of the fine. The Chief Justice reported the matter just as the court had finished its business. It is possible that the matter was taken up at the next term of court, the records of which are lost (cf. Col. Recs., II., 672; and Hawks, *History of North Carolina*, II., 126-7).

<sup>4</sup> Cf. Col. Recs., II., 704 and 711.

looseness was concerned, this law of 1715 had no force. Brickell, who was a physician, says that the white men of the colony suffered a great deal from a malignant kind of venereal disease which they took from the slaves.<sup>1</sup>

We have no evidence that any considerable number of the whites attempted to teach the slaves at that early date. If they did not try to impart a knowledge of religion to them it is not likely that they tried to teach them secular things. As the condition of the people became more settled, however, not a few of the household servants were taught to read and write. We have the slightest view of an organized effort in that direction. In 1763 Mr. Stewart, a missionary in the colony, writes home about a society called "Dr. Bray's Associates," which was conducting a school for the Indians and negroes. Mr. Stewart was superintendent of their schools in the province, but at that time the attendance was but eight Indians and two negro boys. He added that he hoped "that God will open the eyes of the whites everywhere, that they may no longer keep the ignorant in distress, but assist in the charitable designs of this pious society."<sup>2</sup> The tenor of his letter indicates that the society was at that time recently organized in the province. This is the only knowledge we have of it. What success it had we cannot say. The fact that it left no history indicates that it did little for the negroes.

Although the slaves owned by the very first settlers were few, those who succeeded them had larger numbers. Everywhere in the colonization of America the frontiersman has been a distinct species. Used to settling down on little farms on the outskirts of civilization, he has found it hard to become absorbed into the larger life of a settled community. It has most often been his fate to recover from nature a rim of forest land, and then giving that up to some wealthy

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<sup>1</sup> Natural History of North Carolina, p. 48.

<sup>2</sup> Col. Recs., VI., 995-6. Brickell says that several slaves born in the colony could read and write. This was about 1731 (Natural History of North Carolina, p. 275).



habitant of civilized life, to move on toward the West. This happened in North Carolina. Many of the people who occupied their little holdings during the seventeenth century sold them early in the eighteenth and sought other lands for a song on the frontiers. The newcomers were men of means. They usually brought slaves with them.<sup>1</sup> Their coming marks the change from the system of a few slaves to that of many. The same process was facilitated in the newer parts of the country by the opening of the turpentine industry. Here slaves were very profitable, and large numbers of them were taken to the high tracts of long-straw pine which lay back from the low grounds along the river.<sup>2</sup>

The first experiences in the acquisition of the habits of civilization by the slaves had in them an element of the grotesque. Their masters were quick to see this, and in many ways did they become objects of amusement. Brickell speaks especially about their names. Among them he found Diana, Violet, Strawberry, Drunkard, Money, Piper, Fiddler, Jupiter, and Venus. These names suggest the habitual taste of the whites as much as the fancy of the negroes. The planters gave the slaves small patches on which they were allowed to raise tobacco for themselves. This they sold for money. The amount thus realized was supplemented by what they could earn on Sundays. Brickell says they used to gather snake-root on Sunday.<sup>3</sup>

*Slave Insurrections.*—The continued fear of rebellion made the whites very severe in dealing with recalcitrant negroes. Brickell bears witness to this fact. He says he had frequently seen them whipped until large pieces of skin were hanging down their backs, "yet I never observed one of

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<sup>1</sup> Governor Burrington says that early in the eighteenth century a man from Virginia bought eleven adjacent plantations in the older part of the colony. The former owners moved on to the westward. On these plantations, on which white people had formerly lived, there now lived a white man, his wife, and about ten slaves. Col. Recs., III., 430.

<sup>2</sup> Ibid., III., 431.

<sup>3</sup> Natural History of North Carolina, pp. 274-276.

them shed a tear." He was once present when a negro was hanged by a verdict of the neighboring whites, because he had wounded his master.<sup>1</sup> The master had tried hard to save the slave's life, but the people were not to be moved. The slave-owners in the vicinity, according to their custom, brought all their slaves to witness the execution, hoping that it might be a wholesome object-lesson. Not all executions, however, were so mild as hanging. In 1773 a negro in Granville County was burned alive, his crime being the murder of a white man. In 1778 another was burned alive in Brunswick County for the same offense. Judge Walter Clark in speaking of this event remarks: "Doubtless there are other records of similar proceedings in other counties."<sup>2</sup>

The law against insurrections was as severe. Having begun to have slaves, there was the greatest necessity that the strictest means should be used to keep down any rebellion. In 1740 a law for this and other purposes was introduced into the Assembly. It was going successfully through that body when it was cut short by a prorogation arising out of a dispute on another subject.<sup>3</sup> This law was doubtless similar in import to the law of 1741,<sup>4</sup> which has already been cited. It contained a clause which provided that if three or more slaves conspired to rebel or to make insurrection, or plotted to murder any person whatsoever, they should be guilty of felony and punished with death (sect. 47). In 1755 the Assembly's committee on propositions and grievances recommended that "the searching and patrolling for negroes be made more frequent than heretofore,"<sup>5</sup> but no action was taken on the recommendation. In the Assembly that met a few months later, but in the same year, a like recommenda-

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<sup>1</sup> Brickell says this was the law. No such law is to be seen on the statute books. It is likely that this was a custom usually followed in these courts for negroes, and this may be what Brickell meant to say (cf. *ibid.*, p. 272).

<sup>2</sup> See documents republished in the *Wake Forest Student*, Nov., 1895, and in the *North Carolina University Magazine*, May, 1894, p. 405.

<sup>3</sup> Col. Recs., IV., 542, 549, 550.

<sup>4</sup> Laws of 1741, ch. 24.

<sup>5</sup> Col. Recs., V., 299.

tion was made, but it met the same fate.<sup>1</sup> While the province was arming for the Revolution, negro risings were especially dreaded. The Whigs and the Tories were so nearly equal in numbers that the slaves, if they should have united, would have been very troublesome. Moreover, it was reported, and no doubt believed by many people, that the British intended to arm the slaves against the patriots. This induced the colonists to increase their patrol, and out of the excitement that was thus aroused came the only alarm due to a reported insurrection of slaves that we meet in the colonial period.

In Pitt, Beaufort, and the adjoining counties in 1775 the report was spread that a certain ship-captain named Johnston, of White Haven, who was then loading with naval stores in Pamlico River, was inciting the negroes to rebellion. From the stories told by some negroes the whites thought they had discovered "a deep-laid, horrid, tragick plan laid for destroying the inhabitants of this province, without regard to person, age, or sex." The alleged plan was to the effect that through the teachings of Captain Johnston all the slaves in that region had agreed to murder on a given night all the whites of the houses where they (the slaves) lived, and then to proceed from house to house toward the interior of the province, murdering as they went. Here, they were told, they would find the inhabitants and the government ready to aid them. Johnston was just sailing at that time, and he was reported to have said that he would return in the autumn and take his choice of the plantations along the river.<sup>2</sup> The whites believed the story, and for a while the entire region was in a fever of excitement. The terrified people pursued an imaginary band of 150 negroes "for several days, but none were taken nor seen, though they had several times been fired at." This was as near a discovery of the real movement as they ever came. A number of slaves were

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<sup>1</sup> Col. Recs., V., 548.

<sup>2</sup> Col. Recs., IX., 94-95.

arrested on suspicion, and some were whipped severely, but none were proved to be connected with any plot. The report seems to have been entirely unfounded. Indeed, it is not impossible that it may have been wholly concocted for political purposes. The charges that the British were encouraging the slaves to rebel, the British sea-captain, and the necessity of filling up the militia—all are factors which would have made the spreading of such a report not a bad piece of politics, as politics went in those days. At any rate the occurrence must have been advantageous to the patriots.

In connection with this idea one ought to mention the charges made to the same effect against the last royal governor of the province. The patriots charged that Martin, when he took refuge on a British man-of-war in the mouth of the Cape Fear, sent emissaries to arouse the negroes, and that the blacks were in fact fleeing thither. This charge Martin emphatically and indignantly denied. The only foundation there seems to have been to the report was the fact that the Governor's men had made some raids into the interior, in order to get supplies, and that on these expeditions they captured some slaves, which they took with them. The Governor wrote a letter in which he gave it as his opinion "that nothing could justify the design, falsely imputed to me, of giving encouragement to the negroes but the actual and declared rebellion of the King's subjects and the failure of all other means of maintaining the King's government."<sup>1</sup> This was taken as a threat. The patriots ordered the letter to be published. They said that after turning it "in every construction of language" they could only consider it "a justification of the design of encouraging the slaves to revolt when every other means should fail to preserve the King's government from open and declared rebellion, and a publick avowal of a crime of so horrid and truly black a complexion, could only originate in a soul lost to every sense of feeling and humanity and long hackneyed in the detestable and wicked purpose of subjugating the colonies to the most abject

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<sup>1</sup> Col. Recs., X., 138.



slavery.”<sup>1</sup> So far as this declaration referred to Martin’s private character it was unjust; he was not a man “lost to feeling and humanity.” His worst faults were, perhaps, obstinacy and lack of decision. His greatest misfortune was to have to stand in the breach in order to hold up an idea which the spirit of the people had outgrown.

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<sup>1</sup> Col. Recs., X., 138a.

## CHAPTER IV.

## THE FREE NEGRO AND THE INDIAN SLAVE.

*Emancipation.*—Reference has already been made to the fact that as slavery in North Carolina became more extensive it became stricter. When there were but few slaves the white people believed that they could manage them with little difficulty. There was also at that time a tendency to leave the individual rather than the law to deal with them. As the institution grew—gaining, on the whole, on the whites in population, and perhaps as the slaves themselves began to show signs of intelligent organization, the dominant class began to draw tighter the cords of bondage. The masters viewed with suspicion any thing or any people who were disposed to stand in the way of the perpetuation of slavery. Now it was just this that the free negro would do. With no master to watch him, with a sympathy for the slaves, with liberty to go or come at pleasure, and with immunity from the prohibition of carrying arms, he was a very undesirable personage to the slaveholders. Looked at from the standpoint of the latter, limits must be put to the rights, and the making, of free negroes. As they realized this the more, the narrower did they draw these limits.

In the law of 1715 it was enacted that no one should make a contract for his freedom with a runaway or refractory slave, provided this should not be construed to prohibit a man from liberating his slaves for meritorious conduct. It was provided that in case a slave should be freed he should leave the colony in six months after emancipation, on penalty of being sold for five years to any one who would agree to take him out of the government (sect. 17). A way was soon found to avoid this by taking freed negroes out of the

country for a while and then bringing them back. In 1723<sup>1</sup> a law was passed which provided that persons who should be freed and who should return to the country after leaving it should be sold into slavery for seven years. At the end of this term they must leave within six months or again be sold for seven years. Persons who concealed slaves thus sold, pretending that they did it for debt or otherwise, were to forfeit £100. The law of 1741<sup>2</sup> declared that no slave should be set free except for meritorious services, and that such services must be judged and certified by the county court. If a slave otherwise freed were found in the province at the end of six months, the churchwardens should arrest him and sell him at the next county court for the use of the parish; but if he should escape from the parish before the expiration of six months and should return thereafter, he should be sold by the churchwardens as just stated. This was a hardship, inasmuch as it restricted the liberation of slaves to meritorious conduct, to be judged by the court. It afforded a full opportunity, it is true, for the action of the philanthropic feelings of the county courts, but at the same time it gave that tribunal a chance to prohibit emancipation entirely, if it so desired. That it did not act favorably to the slaves is certain; for we find the Quakers in their letter to the London Friends, which has already been cited, complaining that this requirement hindered them in their purpose of emancipation.

*Free Negroes.*—The law of 1741, although it made emancipation more difficult, was yet more favorable to the free negro, since it did not require those who had been liberated by regular means to leave the colony. Earlier than this a great many free negroes had come into the colony. The Assembly, which had the power to condition a man's liberation on his leaving the colony, did not have the power to exclude from the province any free English citizen who in the beginnings of the government had been given the privilege of going into the colony and living there. This policy

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<sup>1</sup> Law of 1723, ch. 5.

<sup>2</sup> Laws, 1741, ch. 24, sect. 56.

was adopted also in the other colonies.<sup>1</sup> It is doubtful if it kept the number of free negroes in any colony at a lower figure. It simply meant that the free negroes of one province were driven into the next. Had they been left in the regions in which they were liberated, where they could have been still under the influence of the old surroundings, they could have been managed more easily. These were two of the sources of the free colored population. Another was the children of white women by negro men. There is evidence that not a few of such people were in the government.<sup>2</sup> Taken all together, there were a considerable number of free negroes among the people by the close of the colonial period.

The privileges of the free negroes were few. They were not allowed to vote. The election law of 1715 provided that no negro, Indian, or mulatto should have the right to vote for a member of the Assembly. This being the only elective civil office in the colony, they were completely disfranchised.<sup>3</sup> This law was repealed by order of the King in 1737,<sup>4</sup> one of the complaints being that freemen as well as freeholders were allowed to vote.<sup>5</sup> No further law was made on the subject till 1760. In the meantime the basis of suffrage was fixed in the instructions to the governors. It was thus arranged that no one but a freeholder could vote for an Assemblyman.<sup>6</sup> The law of 1760 continued this arrangement, and went on to define a freeholder as a person who held in fee simple or for life an estate of fifty acres of land.<sup>7</sup> This requirement gave little opportunity to the free negro. We have no means of knowing whether or not any free negroes voted under it. In 1835 when the constitution was revised there was a proposition before the convention to make them eligible to vote

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<sup>1</sup> Hening, *Statutes at Large*, III., 87, IV., 133.

<sup>2</sup> *Debates of the Convention of 1835*, p. 351.

<sup>3</sup> *Col. Recs.*, II., 214-215. <sup>4</sup> *Ibid.*, IV., 251. <sup>5</sup> *Ibid.*, III., 180-181.

<sup>6</sup> See the instructions to Governor Dobbs, *ibid.*, V., 1110.

<sup>7</sup> *Laws of 1760* (4th session), ch. 1, sects. 3 and 4.



when they owned \$250 worth of property. There were a number that would have been benefited by that provision at that time.<sup>1</sup> Possibly there were a few who would have come within a like provision in the days before the Revolution. Like the slaves, they had not the right of giving evidence against white men. The right of sitting on the jury they probably did not have. The law provided that freeholders "knowing and substantial" should be jurymen.<sup>2</sup> This was ample opportunity to exclude them, and it was very likely used. Although no evidence appears on the point, still it is extremely unlikely that one of them ever held office.

If their rights from the State were abridged, their duties toward it were not impaired. They were required to bear their share in the burden of government, on an equal footing with white men. A law of 1715 enacted that all slaves, male and female, from the age of twelve, and all "males not being slaves" from the age of sixteen, should be deemed taxables.<sup>3</sup> Free negro women were thus untaxed. They did not remain in this condition long, however. In 1723 a law was passed which provided that inasmuch as many free negroes, mulattoes, and other persons of mixed blood<sup>4</sup> had moved into the province, henceforth all free negroes, mulattoes, and persons of mixed blood to the third generation, male or female, of twenty years of age or more, should pay the same levies as other taxables.<sup>5</sup> Complaint was made of these immigrants "that several of them have intermarried with the white inhabitants of this province; in contempt of the acts and laws in those cases made and provided"; and it was ordered that all white persons so married

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<sup>1</sup> Debates of the Convention, p. 60.

<sup>2</sup> Laws of 1746 (1st session), ch. 8.

<sup>3</sup> Col. Recs., II., 889.

<sup>4</sup> The term "negro" was not then so commonly in use as in more recent days. Until well into the second quarter of the nineteenth century it was the usual thing in North Carolina to speak of a free negro as a "free person of color."

<sup>5</sup> Laws of 1723, ch. 5.

be subject to the same tax as was imposed on the negroes. This, it will be seen, would apply more especially to white women married to negro men, since negro women married to white men, unless they were younger than sixteen years, would come under the former provision of the law. How many there were of this class we have no means of knowing. The law of 1760 to regulate the collection of taxes re-enacted the provisions of these two laws, except that persons of mixed blood were to be taxed to the fourth instead of to the third generation. This law continued in force till the end of the colonial period.<sup>1</sup> This bore hardly on free negroes. In 1755 a petition came to the Assembly from the counties of Granville, Northampton, and Edgecombe, praying for relief. The lower house of the Assembly "resolved that the matters in the said petition contained are reasonable, and that the committee appointed to revise the laws receive a clause or clauses to be inserted in the said laws for their relief."<sup>2</sup> It was ten years before the next revision of the laws, and by that time the matter seems to have been reconsidered by the Assembly. Three more petitions to the same effect and from the same region were presented before the Revolution, but without apparent results.<sup>3</sup>

Not only must the free negro help support, but he must also help defend, the government. The instructions to the royal governors ordered a census of freemen and servants, so as to ascertain how many could bear arms.<sup>4</sup> In accordance with the spirit of these instructions the militia laws directed that "all freemen and servants within this province between the age of sixteen and sixty shall compose the militia thereof."<sup>5</sup> By these laws an overseer who had the

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<sup>1</sup> Laws of 1760 (4th session), ch. 2, sect. 2.

<sup>2</sup> Col. Recs., V., 295.

<sup>3</sup> Ibid., VI., 902, 982; VII., 614, 624, 653, 901, 946, 954; IX., 97, 146.

<sup>4</sup> Ibid., V., 1138. Governor Dobbs was told to make a census of the people, "free and unfree," with a view of deciding how many of them are fit to bear arms in the militia of the province.

<sup>5</sup> Laws of 1746 (2d session), ch. 1; Laws of 1760 (3d session), ch. 2; Laws of 1764, ch. 1; Laws of 1768 (2d session), ch. 3.

care of six taxable slaves was to be exempt from musters, and by the last two of these laws he should be liable to a fine of forty shillings if he should appear at a muster. Also free negroes between the ages of sixteen and sixty were required to work on the public road, as were also slaves of the same ages.<sup>1</sup>

If a negro claiming to be free should sue for his freedom, the case was tried in the white man's court.<sup>2</sup> The procedure in a case of this nature which has come down to us was as follows: A negro presented a petition stating that he had shipped from St. Thomas with a certain sea-captain who said he was bound to Europe, but who had brought him into North Carolina. Here the negro deserted and took refuge with Edmond Porter. He then asked that he might be declared free of Porter, who now claimed him as a slave. This petition was presented to the Chief Justice, who ordered the Provost Marshal to take the body of the petitioner and produce it at the next term of the General Court. Porter was furnished with a copy of the petition and served with a writ of *scire facias* to appear at the said court and show why the petitioner should not be adjudged free. In the meantime the Provost Marshal was ordered to hire the petitioner to some one who would give bond to return him to the next court. When the court met, evidence was introduced, arguments were made, and without reference to a jury the verdict was rendered by the Court itself. As the records have it: "The arguments on both sides being by the Court fully heard and understood, it is considered & ordered that the said petition be dismissed."

The law of 1741, which has already been so often cited, had a provision on a subject of a similar nature. Any person who should import or sell as a slave any free person from any Christian country, or a Turk or a Moor<sup>3</sup> in amity with England, should on conviction pay to the person from whom

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<sup>1</sup> Laws of 1764 (1st session), ch. 3, sect. 9.

<sup>2</sup> Col. Recs., II., 702, 703.

<sup>3</sup> Notice that Africans are not included.

the slave should recover his liberty double the price paid for the said free person; and the importer or seller must give bond of £500 to carry the said free person back to the country from which he was brought. Suit could be brought here on complaint to a justice of the peace, who was directed to call the alleged offender before him and to bind him over to the next court. There the case must be determined without formal process of law.<sup>1</sup> This was as fair to the plaintiff as, all things considered, it could have been made; but it must be remembered that the negro who brought a petition under this act labored under the disadvantage of not being able to give evidence against a white man. In many cases the negro's chief witnesses must have been negroes. This law was intended to cover also cases of the illegal enslavement of persons not negroes.

*Indian Slavery.*—The first slaves in America were Indians. The unsuspecting natives of the West Indies were seized almost from the first by the Spaniards and made to work the mines.<sup>2</sup> Although Las Casas succeeded in substituting the more vigorous negroes for the Indians, he did not render the enslavement of the latter entirely impossible. The Indians taken prisoners in war continued to be held as slaves throughout the English colonies on the mainland. This was in keeping with a recognized custom of the Indians themselves. In a few cases, too, the whites who landed along unsettled coasts could not resist the temptation to entice the natives on their ship and sail away to sell them in the settled colonies elsewhere. The first intimation we have of Indian slavery in North Carolina is of the latter sort. Lawson, writing of the New England people who had attempted in 1660 to plant a colony at the mouth of the Cape Fear, says they were driven off by the Indians, some of whose children they had sent to the North under pretext of educating them. The Indians became suspicious that the children had been

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<sup>1</sup> Laws of 1741, ch. 24, sects. 23 and 24.

<sup>2</sup> For an excellent brief description of this phase of American slavery, see Fiske, *The Discovery of America*, II., pp. 427 *et seq.*



sent away into slavery, and became so hostile that the whites left.<sup>1</sup>

Of slaves taken in war we have very slight mention during the seventeenth century. No serious war occurred between the settlers and the natives until the Tuscarora war of 1711 and 1712. A few were captured before this and a few were imported as other slaves. So far as the laws reveal, no difference was made between them and negro slaves in regard to rights, duties, and condition of life. They were thrown closely with the negroes, and the fact that they eventually disappeared indicated that they intermarried with, and were absorbed by, the large body of blacks. Dr. Hawks is perhaps right in supposing that they were used chiefly to hunt and fish for their masters, while the harder work of the field was left to negroes.<sup>2</sup>

The conditions of capturing Indians for slaves are clearly shown in the account of the Tuscarora war. When the attack began Governor Hyde sent to South Carolina for aid. It is of interest to us that he directed his agent there not to fail to represent to that government "the great advantage may be made of slaves, there being many hundreds of them, women and children; may we not believe three or four thousand?"<sup>3</sup> History does not say what effect this argument had on the South Carolina authorities—perhaps none at all; but it does say that the Indian allies that came from the South took back a great number of slaves from the conquered people. The Indians, said Colonel Pollock, as soon as they had taken the fort and secured their slaves, marched away straight to their homes.<sup>4</sup> Tom Blount, chief of a tribe of friendly Indians, also had his captives for slaves. He proposed to attack a certain small tribe in which he thought

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<sup>1</sup> Another reason given for their departure was the sterility of the soil. Perhaps both had something to do with it. See Lawson, *History of North Carolina*, pp. 73, 74; and Hawks, *History of North Carolina*, II., 73.

<sup>2</sup> Hawks, *History of North Carolina*, II., 229, and Brickell, *Natural History of North Carolina*, p. 42.

<sup>3</sup> Col. Recs., I., 900.

<sup>4</sup> *Ibid.*, II., 30.

there might not be enough people to give each of his own warriors a slave, and he accordingly asked the Council to promise some reward, as blankets, to those who might not happen to have slaves allotted to them.<sup>1</sup> Most of the slaves taken in this war were sent out of the country.<sup>2</sup> This was probably because of the difficulty of making tractable slaves of them in their old haunts, or their liability to escape, or the friction that might arise with the unconquered remnant of the tribe if they saw their brethren continually in servitude. When the Indians took these captives they do not seem to have intended to use them any considerable time. They were taken as booty, and no doubt soon came into the possession of slave-traders. These were carried to other colonies, a good many going, it seems, to New England, since Massachusetts in 1712, and Connecticut in 1716, passed laws against the importation of Indian slaves. The objection was that they were fierce and caused trouble.<sup>3</sup> These slaves sold for about £10 each.<sup>4</sup> First and last more than 700 of them were captured and sold before the struggle was ended.

There was no further trouble with the Indians until the French and Indian wars about the middle of the century. At this time the Cherokee Indians who lived on the western frontier went to war against the English. In 1760 the Assembly raised troops to suppress the hostilities. They offered to any one who took captive "an enemy Indian" the right to hold him as a slave. If such an Indian should be killed the captor was to receive £10 from the public treasury.<sup>5</sup> This amount was probably less than the regular price of

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<sup>1</sup> Col. Recs., II., 305.

<sup>2</sup> *Ibid.*, I., 826, and II., 52.

<sup>3</sup> See Steiner, *History of Slavery in Connecticut*, Johns Hopkins University Studies, Series XI., pp. 14, 15. They seem to have kept some of the captives for themselves. For instance, the Meherrins took two children for slaves, which they possibly meant to rear as such. Col. Recs., II., 117. Women and children captured in war seem to have been saved, perhaps for slaves. Cf. Brickell, *Natural History of North Carolina*, 310, 311, 320.

<sup>4</sup> Col. Recs., II., 52.

<sup>5</sup> Laws of 1760 (3d session), ch. I, sect. 13.

such slaves; for if equal to that price the captor would have been tempted to kill the captive so as to avoid the trouble of keeping him. We have no record of how many Indians were taken in this war. They were probably few, and were soon absorbed in the now considerable body of blacks which were being brought to the frontier.

## CHAPTER V.

## WHITE SERVITUDE.

The first slaves that we hear of in North Carolina were white people, and their masters were Indians. Strachey, in his *Travayle into Virginia*,<sup>1</sup> speaks of a story that he had from the Indians of an Indian chief, Eyanoco, who lived at Ritanoë, somewhere in the region to the south of Virginia, and who had seven whites who escaped out of the massacre at Roanoke, and these he used to beat copper. It is not improbable that there is a shadow of truth in the statement, although the details must be fictitious. That the Indians of the colony later on did enslave the whites whom they could take in their waters, or who were shipwrecked off the coast, we know from the preamble of an act of the Assembly about 1707.<sup>2</sup> This form of white servitude left no trace in the life of the colony.

The first laborers that the English took to the New World colonies were whites, who during the first years of their residence were obliged to serve the settlers in the capacity of bonded servants. These people were commonly called "servants" or "Christian servants," and as such are to be distinguished from slaves. In regard to them, as well as to the slaves, their history as it related to North Carolina begins in Virginia. There were three sources of the supply of these servants: 1. There were indented servants, people of no means who, being unable to pay for passage to America, agreed to assign themselves for a certain period to some ship-captain on condition that when he reached Virginia he might transfer

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<sup>1</sup> Published in Hakluyt Society Publications. See p. 26.

<sup>2</sup> Col. Recs., I., 674.



his right for money to some one who would maintain and work the servant for the given period. 2. Transported felons, who were such criminals, vagabonds, or other obnoxious persons as were sent to the colonies by order of the English courts. 3. Kidnapped persons, usually children, who were stolen by traders or ship-captains in the London or Liverpool streets and taken to America, where they were assigned till of age to such planters as would pay the prices demanded for their passages. From these three sources many people came to Virginia during the first sixty years of its settlement. At the time, however, at which North Carolina was being settled, the importation of these people was being checked.<sup>1</sup> This was due to at least three causes: 1. The British government was actually exerting itself to replace the white servants with negro slaves. In this the King was interested. In 1661 the Royal African Company was organized. The Duke of York was at the head of the enterprise and the King was a large stockholder.<sup>2</sup> 2. The conscience of the English public was awakening to the violations of right which the traders perpetrated on those whom they allured by false promises, or forced by fraud, to go with them. These two causes acted together in 1664 when a commission of inquiry, with the Duke of York at its head, was appointed to report on the condition of such exportation of servants. At the same time arrangements were provided by which indentured servants going to the colonies of their own free will might register their indentures at an office created for that purpose. Public sentiment thus aroused continued to grow until in 1686 an Order of Council was issued, which directed: (a) that all contracts between emigrant servants and their masters should be executed before two magistrates and duly registered; (b) that no adult should be taken away but by his or her own consent, and no child without the consent of the parent or master; (c) that in cases of children under fourteen

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<sup>1</sup> Ballagh, *White Servitude in the Colony of Virginia*, Johns Hopkins Studies, Series XIII., 292-297, and 349, note.

<sup>2</sup> Doyle, *Virginia, Maryland and the Carolinas*, p. 386.

the consent of the parent as well as the master must be obtained, unless the parents were unknown.<sup>1</sup> The process was supplemented by an order issued in 1671 to stop the transportation of felons to the continental colonies.<sup>2</sup> 3. The incoming of negro slaves, who, when the experimental stage of slavery was past, were seen to be cheaper than white servants, was probably the most powerful of all the causes. The rivalry was between the whites and the blacks. The blacks won. It is impossible not to see in this an analogous process to that by which negro slavery supplanted Indian slavery in the West Indies. The abuses connected with Indian slavery touched the conscience of the people, and negroes who could better stand slavery were introduced to replace it. The abuses connected with white servitude touched the hearts of the British people, and again the negro was called in to bear the burden of the necessary labor. In each case it was a survival of the fittest. Both Indian slavery and white servitude were to go down before the black man's superior endurance, docility, and labor capacity.

The checking of the introduction of white servitude just at that time saved the colony of North Carolina for slavery. Whatever servants were now taken thither would be carried into the place in ever decreasing numbers. Another cause operated to deprive the colony of even that number of servants which would under these conditions have been its normal share. This was the poor harbors and the consequent lack of direct trade with Europe. The few ships that came through the inlets of the Currituck, Albemarle, and Pamlico Sounds brought few servants to be indented to the colonists. Furthermore, the poor economic conditions of those early days, when the farms were small<sup>3</sup> and the exports inconsiderable, would have made it an unsafe

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<sup>1</sup> Doyle, *Virginia, Maryland and the Carolinas*, p. 385.

<sup>2</sup> Ballagh, *loc. cit.*, 294-295.

<sup>3</sup> See the author's *Landholding in the Colony of North Carolina*, in *The Law Quarterly Review* (London), April, 1895, 160, 161; also *cf. Col. Recs.*, I., 100.

venture for a trader to have tried to dispose of a shipload of servants.<sup>1</sup>

A few servants very probably came to the colony from the first. In the Concessions of 1665 the Proprietors offered all masters or mistresses already in the colony eighty acres of land for each able-bodied manservant whom they had brought in, armed and victualled for six months, and forty acres for each weaker servant, "as women, children, and slaves." Those who should come in during the next three years were to have sixty and thirty acres respectively instead of eighty and forty acres as just stated. Those who should come later than that should get varying other amounts.<sup>2</sup> This system was continued in its existing form for some time, but toward the end of the century it settled down to the habit of giving each man who came into the colony fifty acres for every person, bond or free, whom he brought in with him.<sup>3</sup> A further inducement was offered to the servants themselves. The Concessions of 1665 offered to every Christian servant already in the colony forty acres at the expiration of his or her period of servitude. Those coming later were to have smaller amounts. This inducement could not have brought many servants into the government, for two years later they were offered fifty acres on the expiration of their terms of service. Although this offer was not mentioned in the instructions after 1681,<sup>4</sup> it seems to have been allowed as late as 1737,<sup>5</sup> and perhaps later.

The Fundamental Constitutions, whose spirit was entirely

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<sup>1</sup> South Carolina had good harbors, and it may be asked why it did not get more white servants. The negroes were introduced in large numbers from the first. This was due to two facts: It was somewhat later in settlement than North Carolina, and its first people came largely from Barbadoes, where slavery had been extensively in use. These men taught the colony the use of slaves from an early date in its history.

<sup>2</sup> The Concessions of 1665 were the first formal terms offered to prospective settlers. See Col. Recs., I., 87, 88.

<sup>3</sup> Ibid., I., 334; cf. also *ibid.*, I., 865. See above, p. 17, note 2.

<sup>4</sup> Col. Recs., I., 334.

<sup>5</sup> Brickell, *Natural History of North Carolina*, p. 268.

feudal, provided for white servitude in that they tried to re-establish the mediæval leet men and leet women. They assumed the existence of such persons and directed that on every manor they should be subject to the lord of the manor without appeal. Such servants should not leave the lord's land without his written permission. Whenever a leet man or leet woman should marry, the lord of each should give the pair ten acres of land, for which he must not take as rent more than one-eighth of the yearly produce. It was also stipulated that "whoever shall voluntarily enter himself a leet man in the registry of the county court shall be a leet man," and "all children of leet men shall be leet men, and so to all generations." This impossible feature of an impossible system, it is needless to say, was never put into operation.<sup>1</sup>

In the early period of North Carolina there was continual complaint that the people harbored runaway servants. Governor Nicholson made the charge in 1691,<sup>2</sup> and Edward Randolph, Surveyor General, repeated the charge in 1696.<sup>3</sup> The situation of North Carolina was favorable to Virginia runaways, and it is likely that when servants left their masters in that province they took refuge in the swamps and forests to the southward. But there is nothing to show that North Carolina encouraged such runaways. Henderson Walker wrote in 1699 that the law for apprehending runaway negroes was adequate.<sup>5</sup> He must have referred to the law we find on the statute book in 1715. By that law we learn that any Christian servant who ran away from his master should on being captured be compelled to serve above his regular period of servitude double the time he was away, and in addition such longer time as the court should deem

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<sup>1</sup> For a more extended discussion of the Fundamental Constitutions see the author's *Constitutional Beginnings of North Carolina*, Johns Hopkins University Studies, Series XII., pp. 131-139. Also see Col. Recs. on leet men, I., 191, 192.

<sup>2</sup> Col. Recs., I., 371, 514, 515.

<sup>3</sup> Ibid., I., 467.

<sup>4</sup> Ibid., I., 514.



sufficient to repay the master for whatever damage he may have sustained (sect. 2). This provision was incorporated in the law of 1741.<sup>1</sup> As many servants ran away in North Carolina itself as in Virginia, it seems. John Urmstone, who seems here to have had nothing to gain by an exaggeration, said in 1716, "White servants are seldom worth the keeping and never stay out the time indented for."<sup>2</sup>

The white servants fared better than the slaves. In the first place, they were vastly better than the negroes. In many instances they were people of much worth who had met with misfortune, or who having been poor in the first place had taken advantage of this opportunity to make their fortunes in the New World. Also, they were Christians and they would eventually be freemen and citizens. There was even at that time a well developed beginning of the later Southern idea which instinctively recognized the race distinction between the whites and the blacks. The law of 1715 declared that any servant over sixteen years of age who was imported without indentures should be bound out for five years, but if he were under sixteen years of age he should be bound out until he was twenty-two years of age. The age of such a servant was to be determined by the precinct court. If the master who held the unindented servant did not take him to the precinct court within six months, the period of service should be for five years. As the law of 1741 was stricter than that of 1715 in its dealings with the slave, so it was more humane in its dealings with white servants. It guaranteed the rights of the servant by providing that no imported Christian should be deemed a servant unless the importer could show a written agreement for service (sect. 1).

The rights of the master over the servant, as well as the servant's rights against his master, were fixed by law. As to the former, the law of 1715 was not very explicit; it simply provided that any servant who laid violent hands on his master or overseer should, proof being made, receive such corporal punishment as the courts should think suffi-

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<sup>1</sup> Laws of 1741, ch. 24, sect. 2.

<sup>2</sup> Col. Recs., II., 261.

cient. The law of 1741, in this respect also milder than that of 1715, provided that disobedient servants should be tried before a justice of the peace, and on conviction by the testimony of one or more witnesses should suffer corporal punishment, not to exceed twenty lashes, as the court might determine.

On the other hand the law of 1715 required every master to provide for all his servants, imported or otherwise indented, competent diet, clothing and lodging; and it further directed that no master should "exceed the bounds of moderation in correcting them beyond their demerits." Any servant having a just complaint against his master was to go to the nearest magistrate, who should bind over the master to the next precinct court and, if he thought necessary, take a bond that the plaintiff should not be abused in the meantime. The law of 1741 reaffirmed these provisions, and added that no master should "at any time whip his servant naked without the order from a Justice of the Peace." The penalty for the violation of this law was forty shillings fine, which might be recovered by the wronged servant on petition to the county court, provided it be applied for in six months. The method of taking up such a case was as it had been in 1715, except that the case was to be tried by the county court without formal process of law, and that now the court might at discretion decide what might be the necessary diet, clothing, lodging, or correction. If the master did not agree to observe such a decision, the court was to order the said servant to be sold at public vendue for the balance of his time, the cost being deducted and the remainder of the amount realized going to the master. If, however, such a servant had become sick or in any way incapable, so that he could not be sold for enough to pay cost or charges, he should be placed in the hands of the churchwardens, and the master must provide a necessary support till the time of indenture should be expired. All servants were likewise given the right of coming into the county court without formal action in order to make complaint for their freedom, their freedom dues, or their wages.

The habit of freeing from their obligations sick or incapable servants had evidently become an abuse. The same law tried to prevent such a practice. It provided that a master discharging a sick servant before he was free and not trying to heal him should be fined £5. Such a sick servant must not be liberated if by so doing the servant "may perish or become a charge to the parish." If the law was violated in this particular the servant was sent to the churchwardens, to be supported at the charge of the master till the expiration of the period of service. But if it should appear that the servant had carelessly or viciously brought his sickness on himself, he should serve extra time, at the discretion of the court, to pay his master's loss and the cost of his recovery. This might have put the master at the mercy of his servant; but to protect him it was enacted that in this, as in all others cases of absence from service, if the servant made to the court a groundless complaint against his master he should serve after the period of indenture double the time so lost. It is impossible not to see how this may have operated to the entire injury of a friendless servant. Furthermore, it was provided that a servant put in jail should serve an extra period double the time in jail and also long enough to pay the cost of the suit. If a servant were convicted of stealing from his master he was to serve extra time, at the discretion of the court, to repay the amount of the theft. To prevent such stealing the same penalty was imposed on those who bought goods from servants that was imposed on those who traded with slaves.

The contemporary authorities usually speak in unfavorable terms of the morals of the first settlers in North Carolina.<sup>1</sup> It was charged that it was a place where loose living abounded. This must have been an exaggeration; yet it is possibly true that the inaccessibility of the place and the

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<sup>1</sup> Brickell says: "The generality of them live after a loose and lascivious manner." Later on he adds: "There were certainly persons of both sexes temperate, frugal, good economists" (*Natural History of North Carolina*, p. 37).

lack of religion and education favored the incoming of a considerable undesirable element. There were, however, from the first a great many people of as good social habits as could be found anywhere. In such a condition of affairs the morals of the servants, who came closest to the more corrupt class, must have had a bad tendency. The laws of 1715 and of 1741 indicate as much. The former provided that if any woman servant bore a bastard child during her period of service she should serve two years extra, besides what punishment she should be liable to for fornication. If she came into the province with child she should not come within the provision of this act. If she were with child by her master she should be taken in hand by the churchwardens and sold for two years after the expiration of her time, the money to go to the parish. This law, it will be seen, left the offending master, whose position gave him an opportunity to be chiefly responsible for his servant's sin, entirely unpunished, except as he lost by the failure of her services or as he might be dealt with for fornication and adultery. If she were to have a child by a negro, mulatto, or Indian, she must serve her master two years extra as just stated, and over and above that she should pay to the churchwardens immediately on the expiration of that time six pounds for the use of the parish "or be sold four years for the use aforesaid."

The act of 1741 dealt with this matter more leniently. It stated that, "Whereas many women servants are begotten with child by free men or servants, to the great prejudice of their master or mistress whom they serve," accordingly, any woman servant bearing a child should for such offense be judged by the county court to serve her master for one year after the expiration of her contract. If she should be delivered of a child by her master during this period she should be sold by the churchwardens for the benefit of the church for one year after the term of service. If the father of the child were a negro, mulatto, or Indian, the mother should be sold for two years after her term of service, the money to go to the parish, and the child should be bound out by



the county court till he reached the age of thirty-one years. Here again there was no punishment for the seducing master. It is also evident that the sin of the servant would be an advantage to the master, since he would thereby secure her service for a longer period. We have not the least evidence that such a thing did happen, yet it is possible that a master might for this reason have compassed the sin of his serving-woman.

These were restrictions on bastardy. As for legal union of indented servants, the Marriage Act of 1741<sup>1</sup> provided that no minister or civil officer should, under penalty of £5 to be paid to the master, marry any servant or servants without the written consent of the masters of the same; and that all servants so married should serve one year after the expiration of their terms. This gave the master power to prevent marriage when he should think his interests would be impaired thereby; and probably many masters used their power to prevent the marriage of servant women. At the same time it must have increased unlawful unions. It certainly seems to have been considered a hardship by the Baptists. Just before the Revolution the Kehukee Association was asked if the union of servants who had not been married according to the laws of the land should be held binding before God. The answer was "yes." Again it was asked: "Is it lawful to hold a member in fellowship who breaks the marriage of servants?" The answer was "no."<sup>2</sup>

The law of 1715 provided that when a master freed a Christian servant he must furnish him with three barrels of Indian corn and two new suits of wearing apparel of the value at least £5. But if the servant were a man, a gun in good condition might be substituted for one suit of clothes. These were known as freedom dues. The law of 1741 provided that, on the day of his freedom, there should be given to every servant who did not receive yearly wages, £3 proclamation money and one suit of clothes. Brickell says that

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<sup>1</sup> Laws of 1741, ch. 1, sect. 7.

<sup>2</sup> Biggs, History of the Kehukee Baptist Association, 47 and 48.

he should also be allowed to take up fifty acres of land. He adds that most freed men preferred to sell this and become overseers for some man who had several plantations. These plantations were chiefly devoted to raising cattle, horses and hogs. An overseer was usually allowed one-seventh of the calves, foals, grain and tobacco and one-half of the pigs raised on the plantation. If he were thrifty he was soon able to stock a plantation of his own. Many thus became men of wealth and good standing. The majority, however, were not so steady. These were forced to work for their daily bread. This was the beginning of the poor whites.<sup>1</sup>

One other provision of the law of 1741 ought to be noticed. In the undeveloped condition of the colony it was often necessary to import skilled labor by contract. The importers of such labor often found themselves duped by the men whom they imported. It was now enacted that artisans imported under contract, who were found not to understand the trades for which they had been imported, might have their wages reduced or the contract entirely annulled on conviction in the county court. If the person who thus came in under contract should refuse to work, or absent himself from his master, he could be called into the county court and there be ordered to make satisfaction, and for every day he was idle be compelled to serve two days instead.

In North Carolina, as elsewhere, vagrants might be made to swell the number of white servants. In 1755 the Assembly passed a law on this subject<sup>2</sup> which continued in force till the Revolution. It provided that all vagrants who should be taken up should "be whipped in the same manner as runaways are from constable to constable," to the counties where their wives and children formerly lived, and there give bond for good behavior, "and for betaking him or

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<sup>1</sup> Brickell, *Natural History*, pp. 268-269.

<sup>2</sup> Laws of 1755, ch. 4; Laws of 1760 (4th session), ch. 13; Laws of 1766, ch. 17; and Laws of 1770, ch. 29.

herself to some lawful calling or honest labor." If they were to fail to do this they were to be hired out for one year, the money to be used in paying the expenses of the arrest, and the balance, if any, to go to the families of the said vagrants. Not only vagrants, but criminals, might be sold into servitude at the direction of the court. How much there was of this we do not know. In 1723, one Thomas Dunn, who confessed several petit larcenies, was condemned to be tied to the tail of a cart and be given thirty-nine lashes well laid on, and no one claiming him as a servant, to be sold for four years to any one who would take him out of the province.<sup>1</sup>

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<sup>1</sup> Hawks, *History of North Carolina*, II., 128.

VI-VII

REPRESENTATION IN VIRGINIA





JOHNS HOPKINS UNIVERSITY STUDIES  
IN  
HISTORICAL AND POLITICAL SCIENCE

HERBERT B. ADAMS, Editor

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History is past Politics and Politics are present History—*Freeman*

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FOURTEENTH SERIES

VI-VII

REPRESENTATION IN VIRGINIA

BY JULIAN A. C. CHANDLER, A. M.

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## PREFACE.

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This monograph represents a few chapters of a larger work on the Constitutional History of Virginia, which the writer has in preparation. The investigation has been conducted in an impartial spirit, and with the desire to state truthfully and unreservedly the facts in regard to a special field of our State History which has been overlooked. Only representation in the State Legislature, and not Federal representation, has been here treated. This work shows that the following systems of representation have existed in the State :

(1). Representation by settlements or plantations with no definite number of representatives from each settlement.

(2). Parish and county representation without a fixed number of delegates from either the parishes or counties.

(3). Representation by counties only, two representatives from each county, neither more nor less, whether the counties were large or small.

(4). Representation to the College of William and Mary in accordance with the English custom of allowing representation to the Universities.

(5). Borough representation, granted by the town charters, or by an act of the General Assembly.

(6). From 1830 to 1851, an arbitrary system of representation without a constitutional basis.

(7). Beginning with 1852, another arbitrary system of representation to continue till 1865, when the Legislature should make a reapportionment ; but, in case of failure to do so, a plan was provided by which a constitutional basis was to be adopted by the vote of the people.

(8). Representation apportioned by the so-called " Underwood Constitution," and based on the registered voters of 1867, with a provision for reapportionments after every census, but with no constitutional basis for such reapportionments.



(9). Representation apportioned in 1878 and 1891 with reference to population and county boundaries.

A noteworthy fact in regard to the present system of representation is that there is no constitutional basis, and that the General Assembly has the power to adopt plans for each reapportionment.

Throughout this work the attempt has been made to trace the causes and effects of all movements in regard to representation.<sup>1</sup> By this means light is thrown on the internal conditions of Virginia. The different interests of the two great sections, the one east, and the other west, of the Blue Ridge, are shown. The inability to settle upon a satisfactory basis of representation is seen to have been due to the unequal distribution of the slave population between the eastern and western portions of the State. The inequality of representation, from the standpoint of white population, is shown to have produced much discontent in Western Virginia during the period beginning about 1800 and lasting till 1851, and, as a result, the division of the State was often spoken of and discussed. In short, the jealousy existing until 1851 between Eastern and Western Virginia had its origin in the representative system.

The principal sources used in the preparation of this monograph are the Acts of the General Assembly (1619-1891); the Journals of the General Assembly, as many as could be found; the Proceedings and Debates, and the Journals and Documents, of the Constitutional Conventions of 1829-30, of 1850-51, and of 1867-68; and the contemporary newspapers. Other authorities are also cited in the foot-notes.

Thanks are due to Professor H. B. Adams, of the Johns Hopkins University, and to Messrs. W. W. Scott and W. G. Stanard, of the Virginia State Library, for valuable suggestions.

J. A. C. CHANDLER.

JOHNS HOPKINS UNIVERSITY,  
BALTIMORE, MD., *April*, 1896.

<sup>1</sup>To furnish an adequate treatment of the history of representation, I have introduced an account of the several constitutional conventions, detailing at the same time the repeated fights in the Legislature over the convention question. This ought to be of some interest to the present politicians of the State, since the recent Legislature passed, in March, a bill to submit to the voters, in 1897, the question of a convention to amend the present constitution.

# CONTENTS.

	PAGE.
CHAPTER I.—INTRODUCTION.	
Steps to Representative Government—Charters of 1606, 1609 and 1612—First Legislative Assembly in 1619—Ordinance of London Company, 1621.....	9
CHAPTER II.—REPRESENTATION IN THE COLONIAL PERIOD AND UNDER THE CONSTITUTION OF 1776.	
Representation by settlements, plantations, boroughs, parishes and counties—Constitution of 1776—General Assembly of two houses—Defects of the Constitution of 1776.....	14
CHAPTER III.—THE STRUGGLE FOR EQUALIZING REPRESENTATION.	
Jefferson's opposition to the county system—Madison's attempt for a constitutional convention, 1784—Repeated attempts in the Legislature—Petitions—The western portion of the State most discontented—Winchester and Staunton Conventions of 1816—Senate reapportioned in 1816—Staunton Convention of 1825—Constitutional Convention Bill, 1828—Organization of the Convention.....	20
CHAPTER IV.—THE FIGHT OVER REPRESENTATION IN THE CONVENTION OF 1829-30.	
Prominence of the members—The different elements in the Convention—The white basis and the mixed basis—Attempts at compromise—Failure to adopt a constitutional basis.....	32
CHAPTER V.—THE STEPS TO THE CONVENTION OF 1850-51.	
Internal Improvements; their connection with representation—Condition of Eastern and Western Virginia—Jealousy between the sections due to the system of representation—Attempts to reapportion representation in 1840, 1841 and 1842—Lewisburg Convention, 1843—Attempts for a Constitutional Convention—Staunton Convention in 1846—Constitutional Convention Bill—Approval by the people—Organized on the mixed basis...	45

	PAGE.
CHAPTER VI.—THE REFORM CONVENTION OF 1850-51.	
Fight over white and mixed basis—West <i>vs.</i> East—Compromise—	
Discontent of the East—The new system of representation—	
Disappearance of sectional animosity in regard to representation.....	60
CHAPTER VII.—THE PRESENT SYSTEM OF REPRESENTATION.	
West Virginia organized as a State—Alexandria Government—	
Constitutional Convention of 1867-68—Representation gerry-	
mandered—Apportionments of 1878 and 1891—Comments on	
the present system.....	72

# REPRESENTATION IN VIRGINIA.

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## CHAPTER I.

### INTRODUCTION.

By a charter dated April 10, 1606, James I authorized the settlement of two colonies in the territory of Virginia. Each colony was to have a resident council of thirteen to govern according to the laws and ordinances constituted by the king. In addition to these, there was to be one supreme council in England having control, under the supervision of the king, of the government of the two colonies.<sup>1</sup> Following this charter, on November 20, 1606, James issued the articles of government for the two colonies.<sup>2</sup> These were the laws by which the colonies were to be governed. James appointed the "Council of Virginia" (the council residing in England), granting it no power or authority except at his pleasure and will. It was simply to have the power to appoint the subordinate councils that were to reside in Virginia, and to give directions for the governing of the same. The king reserved to himself the right to "change, alter, or abolish" the council.

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<sup>1</sup> Hening, I, 57-67. The two colonies are spoken of as "first" and "second." The "first" colony was to be anywhere between 34 and 41 parallels of north latitude, and was placed in the hands of the London Company. It is with this that we are concerned.

<sup>2</sup> Hening, I, 67-75.



The council resident in the colony was granted the right to select annually one of its own members (not being the minister) as president, and to remove him. It also had the right to adopt ordinances for the "better government and peace of the people," provided they in no way had reference to the "life or member" of any party. These ordinances were to remain in force till made void by the king or council in England.

The preceding is a brief summary of the machinery of government under which a colony was established at Jamestown, May 13, 1607. The government was entirely at the mercy of the king, no powers of self-government being delegated to the settlers. The councils in England and Virginia were both restricted in their power of making ordinances. In short, there is no germ of representative government. "The form of government thus provided for the new colony was cumbrous and complicated, the legislative and administrative powers being so distributed between the local council, the crown and Company, as to involve the dangers of delays, uncertainty, conflict and irresponsibility. By the words of the charter, the colonists were invested with the rights of Englishmen; yet, as far as political rights were concerned, there being no security provided by which they could be vindicated, they might often prove to be of no more real value than the parchment on which they were written. However, the government of such an infant colony must of necessity have been for the most part arbitrary; the political rights must for a time have laid in abeyance."<sup>1</sup>

May 23, 1609, James granted a charter<sup>2</sup> organizing the London Company into a corporation. This charter was granted because the colony had not prospered under its former management, and the expense to the Company had been so great, that it applied to the king for an extension of its

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<sup>1</sup> Campbell, *Hist. of Va.*, p. 37.

<sup>2</sup> Another charter had been granted in 1607, but it was simply to enlarge the Council in England. Hening, I, 76-79.

privileges and powers ; so the Company was incorporated with stockholders numbering more than six hundred persons and some fifty-six companies: the Company and its successors to be perpetual. A perpetual council, numbering about fifty-two, was established, the king appointing the first members and the treasurer, but afterwards the whole Company was to elect a councillor, or the treasurer, when a vacancy occurred. The Council was authorized to elect all officers for the local government in the colony and to "make, ordain, and establish all manner of orders, laws, directions, instructions, forms and ceremonies of government" for the colony, or "to abrogate, revoke or change" the same.<sup>1</sup> This charter is very noteworthy because it made the Council and Company self-perpetuating, and because the king practically gave up all control over the colony. The powers granted were wide in their scope, and formed the basis for the establishment of representative government in Virginia without recourse to the king.

The London Company now changed the form of government in the colony. The local council was removed, and, instead, the colony was to be ruled by a governor, lieutenant governor and admiral.<sup>2</sup> As yet the colony was not sufficiently populated for a legislative body.<sup>3</sup>

In 1612, James granted a new charter in order to extend the jurisdiction of the London Company over islands within three hundred leagues of the continent.<sup>4</sup> He reaffirmed all the old powers, but, in addition, established a weekly court to be composed of not less than twenty members, to act upon minor matters, and matters requiring immediate attention. But for matters of greater weight and importance, such as the "manner of government," the Company was to hold four General Courts each year. Full power was granted these

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<sup>1</sup> Hening, I, 91.

<sup>2</sup> Stith, *Hist. of Va.*, 101.

<sup>3</sup> The population in 1616 was about 351; in 1618, about 400; but in 1619, over 2,000. Neill, *Lond. Co.*, pp. 111, 181, 410.

<sup>4</sup> Hening, I, 98-100.

courts to establish any form of government for the colony, and to enact laws for its management.

In 1618, the General Court appointed Sir George Yeardley as governor, and gave him a commission for the establishment of a better form of government.<sup>1</sup> The colonists were to be governed as English subjects, and, in order that they might have a voice in the making of their laws, a General Assembly was established.<sup>2</sup> Accordingly, summonses were sent out in the latter part of June, 1619, for the election of burgesses by the people,<sup>3</sup> and the burgesses thus elected met at Jamestown, July 30, 1619.<sup>4</sup> The commission establishing this first legislative body has not been found; but two years later, when Sir Francis Wyatt became governor, the General Court issued a charter which confirmed Yeardley's action.<sup>5</sup> This charter, dated July 24, 1621, with propriety may be called the first American Constitution. It permanently established representative government in Virginia. The government was now (1) a Governor appointed by the Company, (2) a Council of State, to be assistants to the Governor, also appointed by the Company, and (3) a General Assembly in which sat the Governor, Council and Burgesses elected by the people. The General Assembly was to enact the laws for the colony, but the General Court reserved the right to veto its acts.<sup>6</sup>

We have thus briefly stated the steps to representative government, how at first the councils were under the king, and, consequently, the government of the colony was controlled by him; secondly, how, from 1609 to 1612, the control was delegated to the treasurer and council, but this being comparatively a small body was easily influenced by the royal will, and, thirdly, how, after 1612, the management of Virginia

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<sup>1</sup> *McDonald Papers*, I, 135: W. W. Henry, *Va. Mag. of Hist.*, II, 57.

<sup>2</sup> *McDonald Papers*, I, 136.

<sup>3</sup> Smith, *Hist. of Va.*, II, 39.

<sup>4</sup> *N. Y. Hist. Coll.*, ser. 2, vol. 3, 329.

<sup>5</sup> Hening, I, pp. 110-113.

<sup>6</sup> However, when the government of Virginia should become well organized, "no orders of the Court afterwards shall bind the said colony unless they be ratified in like manner in the General Assemblies." (Charter.)

was in the hands of the General Court. This, being the assembly of the whole Company, was too large to be ruled by the king.<sup>1</sup> In 1619, Virginia was in a prosperous condition, the population had greatly increased, and in order that there might be a form of government "for the greatest benefit and comfort of the people, whereby all injustice, grievances, and oppressions may be prevented and kept off from the colony,"<sup>2</sup> the General Court granted the people a representative government. So the English rights and liberties which James had promised in his first charter, but had never granted, were acquired by the inhabitants of Virginia through the action of the London Company.

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<sup>1</sup> This is shown by the fact that Sir Edwin Sandys was elected treasurer in spite of the opposition of James. It is more than probable that James was opposed to representative government for the colony, and that this is one cause of his breach with the London Company. When he was proceeding to revoke the Company's charter, the inhabitants feared that they would lose their assembly, so petitioned the king "that they might still retain the liberty of popular assemblies." The charter was, however, revoked in 1624, and no one can tell what James proposed for Virginia, as he died before he had instituted any other form of government in the colony. Neill, *Lond. Co.*, pp. 177 and 185; Cooke, *Hist. of Va.*, pp. 118, and 129-133.

<sup>2</sup> Hening, I, 110.



## CHAPTER II.

### REPRESENTATION IN THE COLONIAL PERIOD AND UNDER THE CONSTITUTION OF 1776.

In the General Assembly of 1619 there were two burgesses from each borough, plantation, or settlement. With these sat the Governor and Council of State.<sup>1</sup> For this organization there remain no written instructions, but the "Ordinance and Constitution" of 1621 contains this basis.<sup>2</sup> The Council sat with the Burgesses as one legislative body till 1680, after which time it sat apart as an upper house, having only the power to approve or to reject the proposals of the Burgesses,

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<sup>1</sup> *N. Y. Hist. Soc. Coll.*, ser. 2, vol. 3, p. 329; Campbell, p. 139; W. W. Henry, *Va. Hist. Mag.*, vol. II, p. 57, *et seq.*; Neill, *London Co.*, p. 139; *McDonald Papers* (MS.), vol. I, pp. 5-6. The eleven plantations and their representatives are as follows:

- (1) James City: William Powell and William Spence.
- (2) Charles City: Samuel Sharp and Samuel Jordan.
- (3) City of Henrico: Thomas Dowse and John Polentine.
- (4) Kiccowtan (Hampton): William Tucker and William Capp.
- (5) Martin Brandon: Thomas Davis and Robert Stacy.
- (6) Smythe's Hundred: Thomas Graves and Walter Shelley.
- (7) Martin's Hundred: John Boys and John Jackson.
- (8) Argall's Gifte: Thomas Pawlett and Mr. Gourgaing.
- (9) Lawne's Plantation: Christopher Lawne and Ensign Washer.
- (10) Ward's Plantation: Captain Ward and Lieutenant Gibbes.
- (11) Flowerdieu Hundred: Ensign Rossingham and Mr. Jefferson.

<sup>2</sup> Hening, I, 111. The Governor was to call once yearly and no oftener, unless in matters of great importance, an assembly to consist of the "Council of State and two burgesses out of every town, hundred, or other particular plantation, to be respectively chosen by the inhabitants."

and no power to initiate legislation.<sup>1</sup> The Assembly was not called "once yearly" in accordance with the ordinance of 1621, but only at the pleasure of the governor, who had the power to prorogue or dissolve the Assembly, and to issue writs for new elections.<sup>2</sup> The Assembly met quite frequently, however, there being, from 1619 to 1776, about one hundred and twenty-one sessions. The election of two burgesses only from each borough or settlement was not strictly observed. From 1629 to 1645, some plantations had as many as six representatives, and even after the introduction of the county system in 1634, a county, on one occasion, had as many as eight; but, on the other hand, many districts would send only one burgess.<sup>3</sup> Plantations and boroughs continued to be the basis of representation till 1634, when eight counties were established<sup>4</sup>; but after this, at times, plantations were represented.<sup>5</sup> To break up this irregular system of representation, and to prevent the counties from sending so many burgesses, an act was passed, 1645, providing that no county should have more than four burgesses except James City which should send five burgesses for the county and one for Jamestown.<sup>6</sup>

Very seldom the number of burgesses from a county amounted to four, but in three cases there is an apparent infringement of the law. In 1652, Northampton and Charles City had five each, and, in 1658, Northampton again had five.<sup>7</sup> This increase, however, may have been due to parish representation.

At just what time and by what act parish representation was introduced, is not known; but, in 1656, was passed an act

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<sup>1</sup> Beverly, *Hist. of Va.*, p. 188.

<sup>2</sup> *Ibid.*, p. 191.

<sup>3</sup> See *Lists of Burgesses*, Hening, I, pp. 138, 148, 154, 178, 202, 239, 253, 289, 299; and *Va. Hist. Mag.*, vol. II, p. 99.

<sup>4</sup> Hening, I, 224. James City, Henrico, Elizabeth City, Warwick River (Warwick), Warrosquyoake (Isle of Wight), Charles River (York) and Accomac.

<sup>5</sup> Four plantations in 1639, *Va. Hist. Mag.*, II, p. 99.

<sup>6</sup> Hening, I, 300.

<sup>7</sup> *Ibid.*, pp. 370, 373, 431.

recognizing parish representation and alluding to a "former act" which gave the privilege to a parish to send one or two burgesses.<sup>1</sup> The list of burgesses for 1632 shows two parishes sending burgesses.<sup>2</sup> Parish representation gave some trouble, as disputes arose whether the county, or the parish, should pay the parochial burgesses. By the act of 1656, every parish had to pay its burgess.<sup>3</sup> Again the parishes had trouble with the sheriffs in regard to the election of their burgesses, and complaints were made that the sheriffs had refused to return the burgesses elected by the parishes; so, in 1660, it was enacted that the sheriffs, at the request of the vestrymen, should hold elections in the parishes and make returns of the same.<sup>4</sup> In 1658, an attempt was made to pay all burgesses by a duty on exported tobacco, and to reduce the number to two from each county to save expense, but this failed to be enacted.<sup>5</sup>

In 1661, the number of burgesses was limited to two from each county and one from Jamestown.<sup>6</sup> Nothing was said of parish representation. This reduction was due to the expense of so many burgesses; and, in 1662, when the same law was reenacted, the heavy expense was attributed to the "great number of burgesses unnecessarily chosen by several parishes."<sup>7</sup>

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<sup>1</sup> *Ibid.*, p. 421.

<sup>2</sup> These were the upper and lower parishes of Elizabeth City (Hening, I, 154). Immediately after the county became the unit of representation parishes still elected burgesses as shown by the list of burgesses for 1639. (*Va. Hist. Mag.* II, p. 99.) The acts of 1643, establishing Lynhaven Parish (Hen. I, 250) and parishes in Upper Norfolk County (Hen. I, 277), granted them the right to choose burgesses.

<sup>3</sup> Hening, I, 421.

<sup>4</sup> Hening, I, 545.

<sup>5</sup> Hening, I, p. 493. Burgesses were paid by levies in the counties (Hening, I, 267, 421, 493), and parochial burgesses by levies in the parish (Hening, I, 421). There was no definite pay, but each burgess presented his bill to the County Court, or vestrymen, as the case might be, and an order for a levy would be given. This was used for corruption, as men anxious to be elected would offer to take the "place at low rates;" so by an act, 1661, the pay of each burgess was made "one hundred and fifty pounds of tobacco per day, and charge of going and coming."

<sup>6</sup> Hening, II, 20.

<sup>7</sup> *Ibid.*, p. 106.

It was also enacted that every county that would lay out one hundred acres of land, and people it with one hundred tithables, could send one burgess from that place.<sup>1</sup> In 1663, Charles City and Isle of Wight each had three burgesses in spite of the late law, while many counties sent only one.<sup>2</sup>

In 1669, the counties were deprived of the right to choose one, or two burgesses, at discretion, and each county was compelled to send two burgesses, neither more nor less.<sup>3</sup> This established the county system of representation which lasted till 1830. There was no attempt to represent *population*, but simply *districts*, all having equal representation without regard to the number of inhabitants. From time to time, however, the General Assembly created new counties, and each was given two representatives. The College of William and Mary by its charter (1693) was given one burgess.<sup>4</sup>

Town representation necessarily looked somewhat to population, but no definite population was required. Jamestown was first allowed a burgess in 1645, and again by acts of 1661 and 1662.<sup>5</sup> It was the only town represented till 1722, when Williamsburg by its charter was granted representation.<sup>6</sup> Norfolk was given this privilege in 1736.<sup>7</sup>

Thus representation stood in 1776 when a constitution was adopted. This constitution established a General Assembly

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<sup>1</sup> *Ibid.*, pp. 20, 106. This is the first attempt to establish anything like a population basis. Tithables were all white males, negroes and Indian servants, male or female, 16 years old and over. (Hening, II, 84.)

<sup>2</sup> This increase in representation for Charles City and Isle of Wight may be due to the fact that each had laid out 100 acres of land, and peopled it with 100 tithables, but there is no evidence of this. (Hening, II, 187.)

<sup>3</sup> Hening, II, 272.

<sup>4</sup> Charter, art. XVIII; Morrison's *Coll. of William and Mary*, p. 19.

<sup>5</sup> Hening, I, 300; II, 20.

<sup>6</sup> Hening, V, 205.

<sup>7</sup> Hening, IV, 542: and Ingle, *Local Institutions in Va.* (J. H. U. Studies, 3 ser.), p. 124. An act of 1705 (Hen. III, 616) for establishing towns throughout the colony provided that, when the population of any town reached 60 families, it might send one burgess to the General Assembly, but this was repealed about 1710 (Ingle, *Loc. Inst. in Va.*, p. 108).



of two houses, both elected by the people.<sup>1</sup> The House of Delegates took the place of the old House of Burgesses, and was to consist of two representatives from each county, and one from Williamsburg and one from Norfolk. The General Assembly was given the right to create new counties and to grant each two delegates, and also to allow representation to towns and cities at its discretion. In case a town, having representation, decreased in population so that for seven successive years its voting population was less than half the number of voters in some one county, it was to be deprived of its delegate.<sup>2</sup> The delegates were to be elected annually.<sup>3</sup>

A Senate of twenty-four members, for the election of whom the State was to be divided into twenty-four districts, was created. Six districts were to elect each year, in order to have a rotating body, each member serving four years. The General Assembly was to meet annually.<sup>4</sup>

We have now seen that representation in Virginia from the first was based on *districts* and not *population*; that by 1669 all traces of plantation and parish representation had disappeared, and that till 1776, excepting the College, only county and borough representation existed. Also it has been seen that the constitution of 1776 adopted the colonial system of county representation as a basis for the House of Delegates, while in the case of towns the whole matter was left in the hands of the Legislature. In regard to the Senate, the constitution

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<sup>1</sup> Hening, I, p. 57, *et seq.*

<sup>2</sup> It is to be noticed that the College of William and Mary, and Jamestown were deprived of their representatives. Since the capital had been moved to Williamsburg, Jamestown had been decreasing in population till in 1776 there were only three or four families on the island.

<sup>3</sup> At this time there were 62 counties and two boroughs, so the House of Delegates was composed of 126 members.

<sup>4</sup> The qualification for a senator or delegate was that he should be an elector and resident of the district or county which he represented. Furthermore, a senator had to be 25 years old. The Senate was not granted the power to initiate legislation, but with the consent of the House of Delegates could amend any bill except a money bill. (Hening, I, 52.)

adopted no basis, but the same convention that drew up the constitution, passed an ordinance apportioning the Senate. This apportionment was purely arbitrary. The greatest defect, however, of the constitution in regard to representation in the Senate was its failure to provide for future apportionment. The constitution also failed to provide means for any future amendments. The result was that its institutions were very firmly fixed, and it was with difficulty that any measure could be carried through for reform.

## CHAPTER III.

### THE STRUGGLE FOR EQUALIZING REPRESENTATION.

The defects of representation as apportioned by the Constitution of 1776 were soon observed, and by no one more quickly than by Jefferson.<sup>1</sup> In 1782, in his "Notes on Virginia," he stated his views in regard to representation, and pointed out the great inequality, how the Tidewater section with about two-fifths of the fighting men had one half of the senators and lacked only four of having a majority in the House of Delegates.<sup>2</sup> He desired a constitutional convention to rectify the evils of the constitution, which, he claimed, was not a people's constitution, having been adopted by a legislative body without ratification by the people.<sup>3</sup>

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<sup>1</sup> Jefferson was not a member of the convention which drafted the constitution, but was attending Congress in Philadelphia; but, interested in the affairs of the State, he sent a draft of a constitution to Williamsburg. A plan had already been adopted, but to this his preamble was prefixed. A few years ago this proposed constitution was found and published in P. L. Ford's *Writings of Thomas Jefferson*. See *Jefferson's Works*, vol. 7, pp. 405, 406, and *Va. Convention*, 1829-30, p. 160.

<sup>2</sup> Jefferson said: "A majority of the men in the State who pay and fight for its support are unrepresented in the Legislature. Among those who share the representation, the shares are very unequal. Thus the county of Warwick with 100 fighting men has an equal representation with the county of Loudoun which has 1746." His statistics show that the Tidewater section with 19,012 fighting men had 71 delegates and 12 senators; that Piedmont with 18,828 fighting men had only 46 delegates and 8 senators; that the Valley with 7,673 fighting men had only 16 delegates and 2 senators; and that the Trans-Alleghany district with 4458 fighting men had 16 delegates and 2 senators. (*Jefferson's Works*, vol. 8, p. 360.)

<sup>3</sup> Jefferson objected to the constitution on account of (1) the unequal representation, (2) the restricted suffrage and (3) the great power given to the Legislature (*Works*, vol. 8, pp. 361-372).

A constitutional convention was now discussed in the State, and there was some probability that the Legislature would take steps to call one, so Jefferson drew up a plan for a new constitution. This plan, so far as representation was concerned, favored the qualified voters as a basis of apportionment.<sup>1</sup> Jefferson intended to make a fight for calling a convention, but, being sent to France by Congress, he entrusted the work to Madison. At the May session of the Assembly, 1784, the matter was brought up,<sup>2</sup> and a bill for a constitutional convention was introduced. Madison worked hard for the measure, and delivered a speech in which he emphasized the inequality of representation with no provision for reapportionments,<sup>3</sup> but the bill failed. The members of the Legislature in favor of a convention with unlimited powers were small in number, but "included most of the young men of education and talent." Many were willing to call a convention for specified amendments, but no activity was displayed for this qualified plan.<sup>4</sup> Madison wrote that the public did not seem to be at all aroused by the scheme, and took little interest in it.<sup>5</sup>

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<sup>1</sup> The House of Delegates was to be not more than 300 nor less than 100. The State was to be divided into senatorial districts, and each county should elect four senatorial electors for each delegate that it sent to the Legislature. The senatorial electors in every district should meet and elect one senator for every six delegates to whom the district was entitled. This scheme was too complicated, but the representation in the Senate would have been equal. See *Jefferson's Works*, vol. 8, pp. 441-454.

<sup>2</sup> *Journal of H. of Del.* (1784), pp. 55, 70, 71. Mr. Stuart of Augusta County presented a petition, which, among other things, asked for a constitutional convention. This was referred to the Committee of Propositions and Grievances, which reported favorably. Patrick Henry was a member of the Assembly at the time, and violently opposed the measure, which, after a heated debate of two days, was defeated in the Committee of the Whole. It was asserted the General Assembly had no right to act on the matter at all. See *Madison's Works*, vol. I, pp. 81, 86, 90.

<sup>3</sup> *Madison's Works*, vol. I, p. 82.

<sup>4</sup> *Ibid.*, vol. I, p. 86.

<sup>5</sup> *Ibid.*, vol. I, p. 90. (Letter to Jefferson.) The following year he wrote that the proposition was gaining ground. (*Madison's Works*, vol. I, p. 154.)



Between 1784 and 1790 little was done for calling a constitutional convention. Petitions were presented to the Legislature nearly every session after 1790, asking that steps be taken to equalize representation, and petitions from Patrick and Henry counties were regularly looked for,<sup>1</sup> but no decided effort was made by the General Assembly till 1806. In this year, Patrick and Henry again presented their petitions for calling a convention.<sup>2</sup> A convention bill was brought in, and very ably advocated, but was defeated by a considerable majority.<sup>3</sup> The matter was undoubtedly considered of great importance. The main object was to equalize representation. The speeches show this. The system of representation was branded as a violation of the principles of republican government in that the minority was really ruling the State. It was a financial burden to the State to have two delegates from each county. In regard to the Senate the apportionment was emphasized as being very unjust.<sup>4</sup> From 1807 to 1815, many efforts were made for a convention to equalize representation and to establish other reforms, but all in vain.<sup>5</sup>

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<sup>1</sup> *Va. Convention* (1829-30), p. 81.

<sup>2</sup> *Enquirer*, January 28, 1806.

<sup>3</sup> *Enquirer*, February 1, 1806.

<sup>4</sup> See speeches in the *Enquirer*, Jan. and Feb., 1806. According to the census of 1800, the district west of the Blue Ridge had a white population of 177,476 and the East, 336,389; yet the West had only four senators, and the East, twenty.

<sup>5</sup> In 1807, Patrick, Henry and Pittsylvania presented petitions to the Legislature. A bill for a convention was introduced and passed the House of Delegates, but was side-tracked in the Senate. (*Jour. of H. of Del.* (1806-7), pp. 67, 68, and *Enquirer*, Jan. 1, 1807.) From 1807 to 1810 many petitions were presented to the Legislature, but no strenuous efforts were made for a convention. At the session of 1810-11, renewed zeal was displayed. A petition from Accomac asked for a readjustment of representation and an extension of suffrage. Again a bill was introduced to submit the question to the people, but was defeated by the close vote of 82 to 79. Of this Assembly, James Monroe was a member. He opposed the bill, stating that he had seen "democracy run wild in France," and that it would never do to make Virginia more democratic. (*Va. Convention.* (1829-30), p. 173, and *Enquirer*, Jan. 31, 1811.) At the following sessions (1811-12, 1812-13, 1813-14, and 1814-15) of the Legislature, petitions were presented for a convention, and bills introduced, but nothing was accomplished. (See *Jour. of H. of Del.* and *Enquirer*.)

At the session of the General Assembly (1815-16) the fight for a convention, due to the inequality of representation, became a prominent one.<sup>1</sup> The advocates of a convention again introduced a bill to take the vote of the people, but the measure was defeated in the House of Delegates by the close vote of 90 to 87.<sup>2</sup>

Frequent petitions for reform, and just as frequent refusals on the part of the General Assembly to take any action in that direction, necessarily called for other expressions on the part of the people. At the April elections (1816) polls were taken in several counties on the subject of a convention.<sup>3</sup> Addresses were circulated in the State, and long discussions appeared in the newspapers on the question of a convention and the representative system. The fight over the convention and representation at this period was becoming a sectional one. That section west of the Blue Ridge Mountains, which hereafter we shall designate simply as the West, was clamoring for a convention to apportion representation on a more equitable basis, in order that it might have its proper representation in the General Assembly, while that section east of the Blue Ridge, usually spoken of simply as the East, was holding back, unwilling to give up any of its power. As yet the inequality of representation in the House of Delegates, though great between counties, was very small with regard to the two great sections of the State. The bone of contention was the Senate. The western people could see no justice in an apportionment which gave their section, with a white population in 1815 of about 233,469, only four senators, while the East, with a white population of about 342,781, had twenty senators; or, in other

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<sup>1</sup> *Jour. of H. of Del.* (1815-16), pp. 33, 37. Petitions from Ohio, Patrick, Rockingham, Brooke, Frederick, Hampshire, Greenbrier and Shenandoah counties.

<sup>2</sup> *Jour. of H. of Del.* (1815-16), pp. 60, 167; and *Enquirer*, Dec., 1815, and Jan. and Feb., 1816.

<sup>3</sup> *Enquirer*, April 13, 1816.

words, that one man in the East should have the same representation in the Senate as three men in the West.<sup>1</sup>

Thus matters stood when, in May, 1816, twenty-two of the most prominent men of western and northern Virginia met at Winchester to consider some plan for calling a constitutional convention. They issued an address asserting that the Legislature in refusing to take the voice of the people on the question of calling a convention to reapportion representation had violated the Virginia Bill of Rights, and that the then existing basis of representation was an "absolute mockery of the principle of free government." The people were urged to put an end to this condition of affairs, and, for this purpose, to meet at their respective court-houses on July 4 following, and to consider the most expedient way for getting a convention. Each county was requested to elect two delegates to meet in convention at Staunton on August 19, to perfect plans of action.<sup>2</sup> Following the publication of this address much discussion ensued on the subject of representation; one side claiming that representation should be based on wealth and slave population as well as white population, while the other stood for white population only as the basis. Many county meetings were held and resolutions passed on the basis question,

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<sup>1</sup> A writer of the time insisted that the West bore ill will towards the East, because the East had too great a representation, and had full control of the State government. He stated that this jealousy and the difference between the interests of the two sections would exist "so long as one part of the State legislates for the other part." (*Enquirer*, June 8, 1816.) Representation was in such a bad state that it even attracted the attention of Matthew Cary, who in the *Olive Branch* (1815) quoted statistics showing that in Warwick the whole population (including negroes) was only one-eleventh that of Frederick or Loudoun. This was considered as iniquitous as the borough system of England (*Olive Branch*, p. 411). Loudoun and Frederick, represented according to white population in the same proportion as Warwick, would have been entitled to 44 delegates each, instead of two. (*Enquirer*, June 12, 1816.)

<sup>2</sup> See Address, *Enquirer*, June 12, 1816. It was signed by 22 persons, representing the counties of Berkeley, Frederick, Harrison, Wood, Monongalia, Fauquier, Loudoun, Fairfax, Hampshire, Jefferson and Brooke.

and delegates elected to the Staunton Convention.<sup>1</sup> This convention met at Staunton, August 19, 1816. Thirty-six counties were represented, and two others elected delegates who were unable to attend. Representation was the chief point of discussion, and a memorial was drawn up, to be presented to the Legislature, asking it to pass a bill submitting to the voters the question whether or not a convention should be called to equalize representation on the *white population* as a *basis*.<sup>2</sup>

This memorial was presented to the Legislature<sup>3</sup> at its next session (1816-17), and referred to a select committee of which Philip Doddridge was chairman. The committee reported a bill in favor of a convention,<sup>4</sup> which with amendments passed the House of Delegates, but was rejected by the Senate.<sup>5</sup>

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<sup>1</sup> See series of articles in *Enquirer*, from June 19 to Sept. 7, 1816; also *Jefferson's Works*, vol. 7, p. 9.

<sup>2</sup> See Proceedings in *Enquirer*, Aug. 28 and 31, 1816. The memorial stated that, in 1802, 1803, 1805, 1806, 1807, 1810, 1811 and 1815, petitions emphasizing the inequality of representation, were presented to the Legislature and rejected, and that an actual vote had been taken on calling a convention in seven counties, and in these a large majority favored a convention. This meeting in Staunton also recommended a form of a memorial for the counties. There was some talk of calling a general convention to draw up a constitution without recourse to the Legislature, but the advocates of this high handed measure were few in number. Of the 36 counties represented at Staunton, 24 were west of the Blue Ridge, and 12, east.

<sup>3</sup> Sixteen petitions from counties were also presented (*Enquirer*, Dec., 1816, and Jan. and Feb., 1817; also *Jour. of H. of Del.* (1816-17), pp. 28, 31, 37, 82).

<sup>4</sup> *Jour. of H. of Del.* (1816-17), pp. 28, 86, 87. The report showed that in House of Delegates of 200 (the number at the time) based on white population of 1810, Tidewater ought to have 46, while it had 64; Piedmont, 76 instead of 70; Valley, 44 instead of 28, and Trans-Alleghany, 34 instead of 38.

<sup>5</sup> *Enquirer*, Feb., 13, 1817; *Jour. of H. of Del.* (1816-17), pp. 184, 203. The idea was a limited convention, (1) to equalize representation, (2) to equalize taxation and (3) to provide means for future amendments to the constitution. This bill was amended in the House to include an extension of suffrage.



The defeat of this measure was a great disappointment to the advocates of reform. The Legislature saw that something had to be done, so brought in a bill to rearrange the senatorial districts,<sup>1</sup> so as to remove the glaring inequality of representation in the Senate. This measure became a law. The result was a reapportionment of the Senate practically based on the white population of 1810. The East received fifteen instead of twenty, while the West got nine instead of four senators.<sup>2</sup> For a time popular clamor was allayed, although the West was not satisfied entirely with the apportionment in the Senate, as its population had increased much since 1810. In 1824 a constitutional convention was again agitated, and polls on the question were taken by twenty-eight counties and the cities of Lynchburg, Richmond and Petersburg, and of these only five gave majorities in opposition to a convention.<sup>3</sup> In 1824 and 1825, much discussion appeared in the newspapers on a convention to equalize representation on the white basis.<sup>4</sup> Jefferson, though in retirement at Monticello, still took an interest

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<sup>1</sup> *Jour. of H. of Del.* (1816-17), pp. 184, 202, 227.

<sup>2</sup> *Acts of Assembly* (1816-17), pp. 7, 8, 9. The House of Delegates could not constitutionally be changed. Previous to 1816, it was thought the Legislature could not reapportion the Senate, but now the constitutional lawyers claimed, since the Constitution of 1776 did not contain the apportionment of the Senate, but simply said that the State was to be divided into 24 senatorial districts, that the Legislature had the power to reapportion the Senate.

<sup>3</sup> *Enquirer*, April and May, 1824. Most of the counties were Eastern ones, and wanted a convention not to change representation, but for other reforms.

<sup>4</sup> *Enquirer*, 1824 and 1825. This paper favored a convention. Writers on one side endeavored to expose the misrule and unfairness of a rule by a minority, while others tried to excite alarm among the people, claiming that the move to equalize representation was only a plan to destroy an equitable government and to overthrow slave property. There was great difference between the two sections on slavery. The West, especially the northwestern section, was settled by many Northerners, and there were few slaves west of the Blue Ridge and scarcely any west of the Alleghany, many of the people being opposed to the institution. This fact came out now. The East feared that with the white basis the government would pass into the hands of the West, and a policy prejudicial to slavery would be pursued.

in the affairs of his State, and he now came out with an open letter in the *Enquirer* advocating reform in representation.<sup>1</sup> To the Legislature (1824-25) petitions for a convention were presented from several counties. A bill to submit the question to the people was prepared, and passed the House of Delegates, but was rejected by the Senate.<sup>2</sup> This aroused the people, and a vigorous exertion was now made for measures of reform.

Loudoun County took the initiative. A vote was taken, and stood three hundred and eighty in favor of a convention and eight in opposition to it. A meeting was then held, resolutions were passed favoring a general convention of all the advocates of reform at Staunton on July 25, 1825, and a corresponding committee of ten was appointed to issue an address to all the counties of the State, calling upon them to exert themselves in favor of this convention.<sup>3</sup>

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<sup>1</sup> *Enquirer*, April 27, 1824. Jefferson said in part: "The basis of our constitution is in opposition to the principle of equal political rights, refusing to all but freeholders any participation in the natural right of self government. The exclusion of a majority of our freemen from the right of representation is merely arbitrary and an assumption of the minority over the majority. . . . In the representative privilege the equality of political rights is entirely prostrated by our constitution. . . . Upon what principle of right or reason can any one justify the giving to every citizen of Warwick as much weight in the government as to 22 equal citizens in Loudoun?"

<sup>2</sup> See *Jour. of H. of Del.* (1824-25), pp. 17, 149 Bill; in Documents attached to *Journal*; *Enquirer*, Feb. 10, 1825.

<sup>3</sup> *Enquirer*, May 13, 1825. The papers from this date to July 25 are filled with discussion on this proposition. Those advocating a constitutional convention said an alarm must be sounded so loud to the General Assembly as to procure a just respect of their rights. Meetings were held favoring the convention at Staunton, and electing delegates to the same; and editorials in such papers as the *Enquirer*, *Winchester Republican*, *Alexandria Herald*, and *Alexandria Gazette* advocated the movement. A majority of the counties that elected delegates were in the West, yet many in the East favored the meeting at Staunton. Many Eastern counties, however, opposed the meeting as pernicious and dangerous, and claimed that it was bad precedent to have large bodies meeting in the State. Benjamin Watkins Leigh under the nom-de-plume of "Mason of '76" wrote a series of articles in opposition to the meeting at Staunton and a constitutional convention. It is said he asserted that a constitutional convention could not be held

In pursuance of this call, a large number of delegates assembled at Staunton, July 25, 1825. There were one hundred and seven delegates representing thirty-five counties and two cities.<sup>1</sup> Resolutions were adopted in favor (1) of reducing the House of Delegates, (2) of apportioning the members of the General Assembly on the free white population, and (3) of extending the right of suffrage. A form of a memorial, to be signed and presented to the Legislature by the friends of reform, was also adopted.<sup>2</sup> That so many delegates should have appeared from counties hundreds of miles from Staunton, when travel was such a difficult thing, is a strong indication of the feeling of the people, and it is no surprise that following this meeting every effort was put forth by the reformers to influence the coming Legislature in favor of a constitutional convention, or that the conservative element was likewise active. A glance at the newspapers of the period shows how active the people were.<sup>3</sup>

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with safety while Jefferson was alive. Feeling ran high, the East denouncing the West, claiming that the whole move was to oppress slave property. (*Enquirer*, May 13, 20, 31; June 3, 10, 14, 17, 21, 28; July 1, 5, 8, 12, 15, 19, 22, and August 2, 16, 1825.)

<sup>1</sup> Five counties elected delegates who did not attend.

<sup>2</sup> *Journal of Proceedings, Enquirer*, August 11, 1825. See also *Enquirer*, July 29, Aug. 2, 5, 9, 1825. This convention was no small thing. It remained in session for one week. The resolutions were unanimously adopted except the clause on the extension of suffrage against which two votes were recorded. We are told that there were more people in Staunton than ever seen there before, that all the houses in the town were filled, and that spectators had come from all parts of the State. The church in which the convention sat, was always crowded.

<sup>3</sup> See *Enquirer*, Aug., Sept., Oct. and Nov., 1825. Resolutions were passed in different counties, some for and some against a convention, and memorials to be presented to the Legislature were circulated. There were two forms of memorials, the one drawn up by the Staunton Convention, and the other by anti-reformers who were opposed to taking the vote of the people on a convention. The latter was circulated in the East and spoke in a very contemptuous way of the reformers. This caused a bitter discussion which showed that the main fight was still over representation. The East was willing for it to stand as it was, while the West wanted a change in the representative basis and white population only as that basis. (*Enquirer*, Aug. 13, 16, 23; Sept. 13, 26; Oct. 4, 7, 11, 21, 1825.)

When the Legislature met in December (1825), some fifty odd petitions praying for a convention, and some thirty odd in opposition, were presented.<sup>1</sup> A special committee was appointed by the House of Delegates to consider these petitions. It reported a bill favoring the call of a convention, but the measure was defeated.<sup>2</sup> A convention to equalize representation continued to be discussed,<sup>3</sup> and at the next session of the Legislature a bill was again reported in favor of submitting the question to the people, and again it was defeated.<sup>4</sup>

This was quite exasperating to the members of the Legislature who wanted a convention it mattered not on what basis. They held a meeting before the Legislature adjourned, and

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<sup>1</sup> A majority of the petitions for a convention were from the West, but many were from the Piedmont, while only one (from Greenbrier) from the West was in opposition. See *Jour. of H. of Del.* (1825-26), pp. 12, 13, 15, 17, 20, 24, 27, 29, 33, 37, 41, 49, 55, 56, 93.

<sup>2</sup> *Jour. of H. of Del.* (1825-26), pp. 15, 17, 103, 104. The committee was composed of 24 members, one from each senatorial district. In reporting it said that 45 counties had presented memorials in favor of a convention, signed by 12,175 persons; and 26 counties, memorials against a convention signed by 4328 persons. Eleven counties, including Richmond City, had presented memorials both *pro* and *con*, those favoring a convention being signed by 2411, and those against, by 2091 persons. This makes a total of 20,905 signatures, and very probably all were male citizens and mostly voters. Now the votes cast on the convention question in 1828 were in all 38,523 (*Governor's Mess., Jour.*, 1828-29, Appendix); so it is probably that about one half of the voters of the State petitioned to the Legislature at this time, which shows what a fight was being waged over the question. The bill which the committee reported, provided for a convention with unlimited powers (Bill, Appendix to *Jour.*, 1825-26), and was defeated by a close vote of 101 to 94.

<sup>3</sup> *Enquirer*, Sept. 1, 1896.

<sup>4</sup> *Enquirer*, Jan. 23, 27, and Feb. 8, 10, 1827. The vote was 107 to 103. The measure would have passed, had not the question of what basis the convention itself should be organized upon, been brought up. The West wanted a bill, providing for a convention based on the white population only, to be submitted to the people. The East was opposed to this, and wanted the *county system*. Some of the strong advocates of a convention voted against the bill to take the sense of the people on the simple question of "Convention" or "No Convention," being unwilling for the people to vote on it, not knowing what basis the convention would be organized upon.



asserted that the members from the larger counties favored a convention, and that a majority of the people were anxious for one; so they recommended to the voters of every county to instruct their delegates how to vote in the next Legislature on this question.<sup>1</sup> At the April elections (1827) some of the counties took a vote on a convention, and, this being the issue, most of the candidates were probably required by their constituents to pledge themselves either for or against a convention.<sup>2</sup>

When the Legislature met in December (1827) a bill was introduced to submit to the vote of the freeholders the question of a "Convention" or "No Convention," and it passed the House of Delegates by a vote of 114 to 86, and the Senate by a vote of 14 to 10.<sup>3</sup> Thus after a fight which had been waged with more or less vigor for fifty years, the Legislature at last submitted the question to the qualified voters. Polls were opened in all the counties on their respective court-days in April, May and June, and the returns show that 21,896 votes were cast for, and 16,637 against a convention.<sup>4</sup>

It now became necessary for the Legislature (1828-29) to settle upon some plan of organization for the convention. The Legislature was divided into two parties, each wanting to control the convention. The reformers were for the white population as the basis of organization, while the conservative party wanted white population and taxation combined, or Federal Numbers, or the then existing county system. The reformers were mostly from the West, with the exception of delegates from a few large counties of the Piedmont section, while the other party was entirely from the East. The white basis men were very active, and held several caucuses, with

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<sup>1</sup> *Enquirer*, March 8, 1827.    <sup>2</sup> *Enquirer*, April, 1827. Election Returns.

<sup>3</sup> *Jour. of H. of Del.* (1827-28), pp. 16, 23, 33, 131; *Enquirer*, Dec. 15, 1827, and Feb. 2, 1828; *Acts of Assembly* (1827-28), p. 18. The reformers attempted to have the question submitted to all white male citizens over 21 years of age, but this was defeated by a vote of 108 to 91.

<sup>4</sup> See Documents with Governor's Mess., Appendix to *Jour. of H. of Del.* (1828-29), p. 50.

Philip Doddridge as their leader, declaring that they would accept no basis of organization except the white basis. Long speeches were made in the Legislature, and articles appeared in the papers as to the proper basis for the convention.<sup>1</sup> A bill was reported favoring Federal Numbers as the basis of organization; four delegates from each of the twenty-two congressional districts.<sup>2</sup> After many amendments had been offered and rejected,<sup>3</sup> a bill, making the basis of organization the county system with slight modifications, passed the House of Delegates.<sup>4</sup> The Senate rejected this, and offered a substitute, making the senatorial districts the basis, each district to elect four delegates. The House of Delegates accepted this.<sup>5</sup> Thus the law<sup>6</sup> for the organization of the convention took the senatorial districts as a basis,<sup>7</sup> and provided for an election of delegates at the May terms of the county courts. The delegates were to assemble in Richmond on the first Monday in October, 1829. These were the final arrangements for the constitutional convention for which the reform party, with Jefferson as its founder, had fought so long and faithfully.

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<sup>1</sup> *Enquirer*, Dec. 4, 16, 23, 27, 1828; Jan. 8, 13, 15, 22, and Feb. 10, 12, 1829. The editor of the *Enquirer* first advocated the senatorial districts, then the submitting of the question of organization to the voters, and finally the white basis.

<sup>2</sup> *Jour. of H. of Del.* (1828-29), p. 70; also Bill in Appendix.

<sup>3</sup> The amendments in the Appendix show that no less than 12 plans were offered. The most important were (1) Federal Numbers, (2) white basis, (3) senatorial districts, and (4) county system.

<sup>4</sup> The measure as it passed the House of Delegates was one member from each county under 8,000 inhabitants; those with 8,000 or nearly to have two, and for every 4,000 over 8,000, one additional delegate. *Jour. of H. of Del.* (1828-29), p. 143.

<sup>5</sup> *Enquirer*, Feb. 10, 12, 1829.      <sup>6</sup> *Acts of Assembly* (1828-29), pp. 17-22.

<sup>7</sup> The opposition of the West to this basis was very strong. Its members with a few exceptions voted against this plan. They argued that in amending the fundamental constitution of the State, all citizens should be equally represented. The plan adopted, however, giving 36 delegates to the West, and 60 to the East, based on the white population of 1810 (for this is what the senatorial districts as a basis meant), made each Western delegate represent 8,845 white persons, while each Eastern delegate represented only 6,261 whites.

## CHAPTER IV.

### THE FIGHT OVER REPRESENTATION IN THE CONVENTION OF 1829-30.

The Convention assembled in the Capitol at Richmond, October 5, 1829. Its ninety-six members were among the most prominent men of the State, and many of them had a national reputation. It is probable that there has never been in the United States a state constitutional convention in which there was so much talent. There were two Ex-Presidents, Madison and Monroe; the Chief Justice of the United States, Marshall; several who were or had been United States Senators, and many who during their lives were members of Congress, or held other posts of honor.<sup>1</sup> This Convention has always been regarded as one of the greatest assemblies of intellect ever held on Virginia soil.<sup>2</sup>

The Convention began its work by selecting James Monroe as President,<sup>3</sup> and by appointing four committees, one of which was on the Legislative Department. Of this Madison was Chairman.<sup>4</sup> This Committee reported October 24, and so far as representation was concerned it favored the *white*

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<sup>1</sup> See *Proceedings and Debates of Va. Convention*, 1829-30, pp. 3-4. Lists of Members.

<sup>2</sup> There are two sketches of this Convention: one, a speech by Hugh Blair Grigsby, delivered before the Virginia Historical Society, Dec. 15, 1852, published in *Va. Hist. Reporter*, vol. I, Richmond, 1854: the other, by Hugh R. Pleasants in *Southern Literary Messenger*, vol. 7 (1851), pp. 147 *et seq.*, and pp. 297 *et seq.* There is a painting of this Convention in the Portrait Gallery of the Va. State Library.

<sup>3</sup> *Debates of Convention*, p. 1.

<sup>4</sup> *Ibid.*, p. 23.

population as the basis for the House of Delegates, and a reduction of its number to not less than one hundred and twenty, but not more than one hundred and fifty. In regard to the Senate, the report favored no change at all.<sup>1</sup>

This report was taken up in the Committee of the Whole, and then was waged a fierce battle in which some of the keenest intellectual swords were exercised. The reformers stood for the white population as the basis of representation for both houses, and tried to amend the report to that effect, while the conservatives thought that the true basis for both houses was white population and taxation combined. The latter was called the *mixed basis*, while the former was spoken of as the *white basis*.

The mixed basis was the Eastern plan, and was supported entirely by members from the East.<sup>2</sup> They contended that this basis was the only means of giving justice and protection to property, especially slave property. The white basis would put the government in the hands of non-property holders to a great extent, and property might be oppressed with heavy taxation.<sup>3</sup> The white basis would give representation to the labor of the West without taxation, while the labor of the East would be unrepresented, yet taxed; however, in the political economy of the country, the Western laborer would fill the same place as the slave.<sup>4</sup> The East, furthermore, feared that the *internal improvement* element in the State would gain too much power by an apportionment on the white basis.<sup>5</sup>

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<sup>1</sup> *Ibid.*, p. 39.

<sup>2</sup> The two parties in the Convention were about equally divided. The white-basis men were the 36 delegates from the West, and 12 from the larger counties of the Piedmont section. The mixed-basis party were the remaining Eastern members. See *Debates of Convention*, p. 690.

<sup>3</sup> Benj. W. Leigh's Speech, *Debates of Convention*, p. 153. The best speeches for the mixed basis were by Leigh, Abel P. Upshur, Robert Stanard, Thomas R. Joynes and Governor Giles. Leigh was the leader of the Eastern party.

<sup>4</sup> *Debates of Convention*, p. 153.

<sup>5</sup> *Ibid.*, pp. 127, 155.



It was further argued that the true principle of government was not simply a rule of a majority of members, but of a majority of interests, and that the mixed basis was a happy combination of both principles.<sup>1</sup> The whole matter comes to this: The mixed basis was to the interest of the East, which, holding a very large slave population and paying a large per cent. of the taxes, was unwilling to entrust the government to the West, where the people were essentially a non-slaveholding population, and many of anti-slavery sentiment.<sup>2</sup>

The advocates of the white basis argued from the Bill of Rights that "all power is vested in and consequently derived from the people," which would be true in regard to the white basis only, as the *mixed basis* would recognize wealth as an element in granting power.<sup>3</sup> The white basis conformed to the principle that a majority of the people should rule, while the mixed basis would put the entire control of the government in the hands of the minority, and that a minority of plutocrats.<sup>4</sup> A millionaire would have, under the *white basis*, representation no greater than any other white man, but by the *mixed basis* he would be granted representation equal to that of many hundreds of honest citizens.<sup>5</sup> In short, the West took this view of the matter, that one white man was equal to any other in a political sense, whether he owned property or not, and thought the East would have viewed it

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<sup>1</sup> *Debates of Convention*, p. 66.

<sup>2</sup> The East at this time had about 390,000 slaves, while the West had only about 50,000. (*Debates*, p. 112.) The East in 1828 paid \$321,926 taxes, and the West \$104,636. For full statistics see Auditor's Report in Documents appended to the *Journal of the Convention*.

<sup>3</sup> *Debates of Convention*, pp. 54, 55.

<sup>4</sup> *Ibid.*, pp. 58, 106.

<sup>5</sup> *Ibid.*, p. 58. Mr. John R. Cooke's speech. Good from the standpoint of the natural rights of man. Principal speeches for *white basis* were by Philip Doddridge, Chapman Johnson, Alfred H. Powell and W. F. Gordon. Doddridge was the leader of this party.

in the same way but for its interest in slave property.<sup>1</sup> Furthermore, the West wanted more power in the government, so that it might foster its internal improvement schemes.

At an early stage of the debate<sup>2</sup> it became plain that the State was divided into two sections with widely conflicting interests, and that each was jealous of the other. The only way by which the wound could have been healed would have been the adoption of the white basis with a spirit of trustfulness in the West, or a plan providing for the adoption of the white basis at some future time. But the East was not willing to sacrifice its principle of representation, so the only way left was to try to adopt some compromise basis. As stated, the Legislative Committee reported in favor of the white basis for the House of Delegates, and a permanent Senate as it then stood. To this an amendment was offered to substitute the mixed basis for the House.<sup>3</sup> To this amendment an amendment was offered to apportion the House of Delegates on the mixed basis and the Senate on the white basis, but it was defeated.<sup>4</sup>

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<sup>1</sup> *Debates of Convention*, p. 149. A careful reading of the *Debates* shows that the inequality of the distribution of slavery and taxation in the two sections produced the difference, and gave rise to the two schemes for representation. The conditions of the State were peculiar, something like 80 per cent. of the slaves being in the East, and about 75 per cent. of the taxes being paid by that section, so it was but natural that the East should be reluctant to adopt a basis of representation which might take the government from it, and give the control to a section with conflicting interests. Hence the East advocated the mixed basis.

<sup>2</sup> The debate was throughout lively and animated, and at least two-thirds of the time that the Convention was in session the subject of representation occupied the attention of the members.

<sup>3</sup> *Debates of Convention*, p. 53. Judge Green's amendment.

<sup>4</sup> This amendment was proposed by Mr. Scott, of Fauquier. *Debates of Convention*, p. 148. Monroe now saw the condition of affairs, the growing conflict between the sections, and, though infirm in health, addressed the Committee of the Whole. He said, in part: "If we go home without having agreed upon a constitution, or if we shall agree upon one, and shall pass it by a small majority, what will be the effect? An appeal will immediately be made to the whole community, which will excite repellant feel-

Finally, after a debate of twenty-two days, the first amendment was lost by the vote of 49 to 47.<sup>1</sup> Many plans were now proposed in regard to both the House of Delegates and the Senate, but there seemed to be no possible way of bringing about an agreement for a constitutional basis.<sup>2</sup> After two

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ings in one section against the other, which will endanger the dismemberment of the State. . . . Sectional feelings already existing will be nursed and cherished, they will increase and spread till at length one part of the community will be pitted against the other, and a deep and malignant acrimony will ensue, and where will it end? In an actual dismemberment of the Commonwealth, which would be the worst evil that can befall us, a result that will be equally calamitous to all. . . . It is contended by those who reside in the western part of the State that representation in the Legislature should be based on white population alone; it is contended, on the other hand, by those who live in the East, that it should be based on the principle of population and taxation combined. These are the two grounds of difference. I am satisfied that the claim of those in the West is rational under particular circumstances. It has often been suggested here, and I accord with that view, that, putting the citizens in an equal condition, the basis which they claim is just. It is founded on the natural rights of man, and in policy, also, under certain circumstances. But look at the Atlantic country and what is their claim? They are the oldest portion of the State, they have a species of property in a much greater amount than the people of the West, and this they wish to protect. It consists of slaves. I am satisfied if no such thing as slavery existed that the people of the Atlantic border would meet their brethren of the West upon the basis of a majority of the free white population." Monroe then advised both sides to yield some, and declared in favor of some measure by which "representation should be based on the white population with some reasonable protection for property." He thought the best plan would be to apportion the House of Delegates on the white basis and the Senate on the mixed basis. These, at some length, are the views of Monroe, but they are very interesting as showing the light in which a fair-minded observer viewed the situation. *Debates of Convention*, pp. 148-151.

<sup>1</sup> *Debates of Convention*, p. 321.

<sup>2</sup> One plan was white basis for House of Delegates and taxation exclusively for Senate; another (Leigh's), Federal Numbers for the House of Delegates. Madison and Marshall favored the last, but Monroe spoke in opposition to it. An attempt was made to settle the Senate first, and several propositions, one for Federal Numbers, another for mixed basis, and a third for taxation exclusively, were offered and rejected. *Debates of Convention*, pp. 321, 322, 361, 446, 447, 449.

months of fruitless debate and nothing at all adopted in regard to representation, many different compromises were proposed. One plan was to drop the basis question entirely, and simply to make an apportionment in both branches of the Legislature to remove the glaring inequalities of representation;<sup>1</sup> another plan was for an average of the three bases (white basis, Federal Numbers and mixed basis), as a constitutional basis.<sup>2</sup> The Western members held repeated conferences to provide some plan of compromise, and after careful consideration they presented as their best proposition white basis for the House of Delegates and Federal Numbers for the Senate; a reapportionment to be made every ten years according to this principle.<sup>3</sup> Chief Justice Marshall now declared

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<sup>1</sup>*Debates of Convention*, p. 455. The plan of William F. Gordon, of Albemarle, a white-basis man: He proposed a Senate of 24, 10 from the West and 14 from the East; and a House of Delegates of 120: 26 from the Trans-Alleghany district, 24 from the Valley, that is, 50 from the West; and 37 from the Piedmont, 33 from Tidewater, making 70 for the East.

<sup>2</sup>*Debates of Convention*, p. 494. The plan of Abel B. Upshur: Senate of 30; West, 13, and East, 17. House of Delegates, 120; West, 48, and East, 72. B. W. Leigh offered a plan for a House of Delegates of 126; East, 77, and West, 49. It provided that the number of counties in the West could be increased and given delegates by the General Assembly, provided the House never exceeded 130. By this the East would have always retained the majority. There was to be no constitutional basis, but the apportionment proposed was on an average between the white and mixed basis. (*Debates of Convention*, p. 547.)

<sup>3</sup>It was emphasized that, unless this plan was adopted, the West would not be satisfied, and that there would still be trouble in regard to the basis question. (*Debates of Convention*, pp. 495-496.) There was an element from the West that thought the white basis should be the only principle for both Houses, but was willing to limit the powers of the Legislature in such a way that one section could not overburden another by high taxes and large appropriations. A plan to this effect was submitted by Alexander Campbell. All taxes were to be *ad valorem* and on a fixed ratio between personal and real property, and appropriations for internal improvements in either the East or West to be in "proportion to the amount of taxes paid by the citizens" in those sections. The East viewed such limitations as mere "paper guarantees," claiming that, if the West once controlled the State government, it would be an easy thing to call another constitutional convention and to remove all restrictions. (*Debates*, p. 497.)



his views on the basis question. Individually he favored Federal Numbers, but was willing to compromise on an average between the white basis and Federal Numbers.<sup>1</sup> Every effort was made for reconciliation and for removing the jealousy existing between the sections of the State. Madison, who fifty-three years before had been a member of Virginia's first constitutional convention, though feeble, pleaded for agreement, and advocated Federal Numbers.<sup>2</sup>

There were five compromise plans before the Convention: two for simple apportionment without adopting a constitutional basis; one for an average of the white basis, mixed basis and Federal Numbers as a constitutional basis; another for white basis in the House of Delegates and Federal Numbers in the Senate; and another for an average between the white basis

<sup>1</sup> *Debates of Convention*, p. 498. The different plans for a basis of representation during the Convention were, (1) white population alone (*i. e.*, the white basis), (2) mixed basis, (3) Federal Numbers, (4) total population, and (5) taxation exclusively. To show the difference, I have prepared the following:

	HOUSE OF DELEGATES OF 120.		SENATE OF 30.	
	<i>East.</i>	<i>West.</i>	<i>East.</i>	<i>West.</i>
<i>White Basis.</i>				
(Census, 1830).....	64	56	16	14
<i>Mixed Basis.</i>				
{ (Taxes, 1828) .....	77	43	19	11
{ (Census, 1830) .. .....				
<i>Federal Numbers.</i>				
(1820).....	81	39	20	10
<i>Total Population.</i>				
(1820).....	86	34	21	9
<i>Taxation only</i> .....	91	29	22	8

Cf. census of 1820, 1830; *Documents of Convention*, 1850-51; *Documents of Convention* of 1829-30 (Appendix to *Journal*), and *Debates* (1829-30), pp. 140, 270, 499.

<sup>2</sup> *Debates of Convention*, pp. 537-538 and 573-574. When he rose to speak, his voice was so weak that he could scarcely be heard, and the members from all parts of the hall crowded around him, wishing to hear every word that fell from his lips.

and Federal Numbers for both houses.<sup>1</sup> Once more a lively debate ensued, and it became evident that no compromise basis would be adopted; so the only thing was to make a more equitable apportionment, and to reduce the House of Delegates. The reformers opposed every basis that did not embody the *white basis* for the House of Delegates, and the conservatives were unwilling to yield this. John Randolph had already suggested an adjournment *sine die*;<sup>2</sup> and there was talk of the West seceding from the Convention in a body,<sup>3</sup> so great was the animosity between the two sections over this basis question. The plans were now narrowed down to two, Gordon's and Upshur's. These had been so modified as to give by the former a majority of twenty-six to the East on joint ballot of

<sup>1</sup> *Debates of Convention*, p. 547. To give some idea of these plans I add the following table:

		HOUSE OF DELEGATES.		
		West.	East.	Total.
Mr. Gordon's plan...	{ Apportionment without adopting any basis. Calculations on white population, 1820.	50	70	120
Mr. Leigh's plan....	{ Apportionment without adopting any constitutional basis. Calculations on an average between mixed basis and white population, 1829.	49	77	126
Mr. Cooke's plan....	{ White population as constitutional basis. Western plan. Census according to Auditor's statement, 1829.	56	64	120
Mr. Upshur's plan...	{ Average of white basis, mixed basis and Federal Numbers as a constitutional basis. Apportionment according to estimate of 1829.	48	72	120
Mr. Marshall's plan.	{ An average of white basis and Federal Numbers as a constitutional basis. Census of 1820.	47	79	126

<sup>2</sup> *Debates of Convention*, pp. 492 and 572.

<sup>3</sup> *Debates of Convention*, p. 571. Leigh said that it was talked of outside the Convention, and Doddridge announced that he individually was thinking of leaving the Convention, since the Eastern members had announced as their ultimatum that they would not apportion the House of Delegates on the white basis, or vote for any measure which would provide for the adoption of that basis at some future time.

the two houses, and by the latter a majority of twenty-eight.<sup>1</sup> Of the two the West preferred Gordon's plan, which, further modified so as to give the East on joint ballot a majority of twenty-seven, was finally adopted in the Committee of the Whole by a vote of 49 to 43.<sup>2</sup> This plan was not satisfactory to the Western members, as it provided no basis for future apportionments. They denounced it as a "mere shift and temporary expedient," declaring that the adoption of no constitutional basis would mean another convention in the near future, and a continuation of the strife between the two sections.<sup>3</sup> Attempts were then made to adopt a basis for future apportionments. Many plans were offered,<sup>4</sup> and the Committee of the Whole finally declared for an average of the white basis and Federal Numbers.<sup>5</sup>

On the 18th of December, the Committee of the Whole reported Mr. Gordon's plan to the Convention, and it was passed by a vote of 50 to 46.<sup>6</sup> The measure which the Com-

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<sup>1</sup>Gordon's original plan was a House of Delegates of 120, 50 from the West and 70 from the East; and a Senate of 24, 10 from the West and 14 from the East: the Senate was afterwards changed to 32; 13, West, and 19, East. Upshur's original plan was a House of Delegates of 120; 48, West, and 72, East: a Senate of 30; 13, West, and 17, East. He afterwards changed the Senate to 32; 14, West, and 18, East. *Debates of Convention*, pp. 455, 494, 559, 567, 570.

<sup>2</sup>*Debates of Convention*, p. 574. As adopted by the Committee of the Whole, the House of Delegates was to be 127: 29 from the Trans-Alleghany district, 24 from the Valley, making for the West 53; 40 from the Piedmont and 34 from Tidewater, making 74 for East. The Senate was to be 32; 13, West, 19, East.

<sup>3</sup>*Debates of Convention*, pp. 570, 571.

<sup>4</sup>Doddridge proposed after every census to reapportion the House of Delegates on white basis, and the Senate on Federal Numbers. Another plan was to submit to the people after the next census the question which basis was to be used; another to take the vote of the people on the *white basis*, when the new constitution would be submitted, and still another was to adopt the *white basis* for the House of Delegates and to leave the Senate unchanged. *Debates of Convention*, pp. 570, 574, 575.

<sup>5</sup>*Debates of Convention*, pp. 574, 575. Mr. Upshur's proposal; but originally suggested by Marshall.

<sup>6</sup>*Debates of Convention*, p. 668.

mittee of the Whole reported, making the basis for future apportionments an average between the white basis and Federal Numbers, was so thoroughly distasteful to the Western members, and they asserted with so much vehemence that they would not submit to it, that the members from the East were afraid to push it, and it was defeated.<sup>1</sup> Repeated attempts were still made to adopt some basis. All argued that the matter must be settled for good and all, and forever sunk, or else a division of the State would follow; yet they would not agree.<sup>2</sup>

A select committee was appointed to draft a constitution from the resolutions that had been passed.<sup>3</sup> In regard to representation they reported that it was difficult to make the apportionment of delegates to the different counties, and there was complaint of injustice done to some counties.<sup>4</sup> No great difficulty was experienced in regard to the Senate. The Convention struck out one hundred and twenty-seven as the number for the House of Delegates,<sup>5</sup> and gave the power to the select committee to apportion representation, provided it

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<sup>1</sup> *Ibid.*, p. 671.

<sup>2</sup> B. W. Leigh presented a plan for a House of Delegates of 139, 56 from the West and 83 from the East. The East was to have no more new counties, but ten could be formed by the Legislature in the West. As population increased, representation could be increased provided the House never exceeded 160. This meant that 21 more members could be added to the House of Delegates. Should the West get all, the East would still have a majority of 6, consequently this plan was not satisfactory to the West. Doddridge offered white basis for the House of Delegates and Federal Numbers for the Senate, to take effect after 1840; another proposal was Federal Numbers for the House and white basis for the Senate; another that in 1840 and every ten years after, a census of the qualified voters be taken and the Legislature make an apportionment in both houses on this basis; and still another, that the Senate be a fixed body, and the House be based on the qualified voters. (*Debates of Convention*, pp. 675, 676, 680, 681, 689, 690, 705, 749, 751, 765.)

<sup>3</sup> *Debates of Convention*, p. 777. The committee was Madison, Marshall, Doddridge, Chapman Johnson, B. W. Leigh, Tazewell and Cooke.

<sup>4</sup> *Debates of Convention*, p. 798.

<sup>5</sup> *Debates of Convention*, p. 799.



was done so as to retain the relative proportion for the four districts of the State. The House of Delegates, however, was not to exceed one hundred and fifty.<sup>1</sup> The committee made the House of Delegates one hundred and thirty-two: thirty from the Trans-Alleghany district, twenty-five from the Valley; forty-one from the Piedmont, and thirty-six from the Tidewater section.<sup>2</sup> The Convention changed this by adding one to the Trans-Alleghany district, and one to the Piedmont.<sup>3</sup> It was also agreed that, in 1841 and every ten years after, the Legislature should have the power to reapportion representation, provided no change was made in the number from any district.<sup>4</sup> There was a strong desire to adopt some plan for a reapportionment of the whole State without reference to the districts; so finally a resolution, proposed by Mr. Madison, was carried and introduced into the constitution, that the "General Assembly after the year 1841 and at intervals thereafter of not less than ten years, shall have authority, two-thirds of each house concurring, to make reapportionments of delegates and senators throughout the commonwealth so that the number of delegates shall not at any time exceed one

<sup>1</sup> *Ibid.*, p. 808.

<sup>2</sup> *Ibid.*, p. 820.

<sup>3</sup> *Ibid.*, pp. 847, 848, 898. The clause on representation in the constitution thus made the House of Delegates 134, apportioned as follows:

The district west of Alleghany (Trans-Alleghany).....	26 counties, 31 delegates	} West, 56.
The district between Alleghany and Blue Ridge (Valley).....	14 " 25 "	
The district between Blue Ridge and Tidewater (Piedmont)....	29 " 42 "	} East, 78.
The Tidewater section.....	36 counties and three cities, 36 delegates	

The Senate of 30: West, 13; East, 19. This gave the East a majority of 28 in the Legislature. The apportionment was on the census of 1820, according to which the population (white) of the East was 349,073, and of the West 254,208. An apportionment on the white population as it then stood (1830) would have given the West 62 and the East 72 in the House, and in the Senate, the West 15 and the East 17; an Eastern majority of only 12.

<sup>4</sup> *Debates of Convention*, pp. 828, 836.

hundred and fifty, nor of senators, thirty-six.”<sup>1</sup> These amendments were not satisfactory to the Western members who claimed that it would be impossible ever to get the Legislature to agree, or to get a two-thirds majority.<sup>2</sup> When the final vote was taken in the Convention on the constitution the Western men voted against it because of the failure to settle the basis question.<sup>3</sup>

January 15, 1830, the Convention adjourned *sine die*, and at the April elections (1830) the new constitution was submitted to the people and ratified by a vote of 26,055 to 15,563.<sup>4</sup> Of the forty Western counties, only eleven gave majorities for the constitution, and in these the vote was close,<sup>5</sup> while all the Eastern counties gave majorities for the constitution, most of them very large majorities, except Warwick and Lancaster which voted for rejection.

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<sup>1</sup> *Debates of Convention*, pp. 849, 854.

<sup>2</sup> *Ibid.*, p. 850.

<sup>3</sup> The constitution passed the Convention by the vote of 55 to 40. Cooke was the only Western man who voted for it. Doddridge was sick, but would have voted “no.” Thirty-four Western men voted against it, one Tidewater man, Stanard, and five from the Piedmont. (*Debates*, p. 882). The white-basis men claimed 49 members of this convention, but a few were unwilling to pass their basis without a decided majority, hence the *white basis* was not adopted. (*Debates*, p. 694). The West had only 36; the others were from the Piedmont. At one time there was a white-basis man from Tidewater, Robert B. Taylor of Norfolk, but his constituents forced him to resign. (*Debates*, pp. 234, 235). The West remembered his stand, and in the next Legislature with some Eastern members elected him a circuit judge for the Norfolk district in spite of opposition to him from that circuit.

<sup>4</sup> *Debates of Convention*, p. 903. (Official poll of each county.) The vote of the West was 13,282 for rejecting and 5,985 for ratification; of the East, 2,281 for rejecting and 20,070 for ratifying. The vote for ratification in the West would not have been so large but for the clause extending suffrage. The vote shows the difference in the sentiment of the two sections.

<sup>5</sup> These eleven counties were Alleghany, Augusta, Botetourt, Frederick, Hampshire, Jefferson, Lee, Rockbridge, Rockingham, Shenandoah and Washington; all Valley counties except Lee and Washington. These counties were all large and would gain by the new system of representation.

The new constitution, though in many respects a failure, made improvements in representation. It reduced the House of Delegates from 214 to 134, and thus cut down the expenses of the government. Glaring inequalities of representation were removed, such, for instance, as two delegates from Warwick, while Loudoun, with twenty-two times as large a white population, had only two delegates. In fact, throughout the State the counties had representation apportioned more nearly in accord with their respective populations. With reference to the two great divisions of the State, the apportionment was better. The West, under the old constitution, had about 33 per cent. of the members of the Legislature. It was now given 41 per cent. Had the apportionment been made on the white population as it then stood, the West would have received about 46 per cent., hence that section never became reconciled to the new constitution. No reapportionment could be made before 1841, and not even then could the numbers from the different sections be disturbed, unless two-thirds of the General Assembly concurred; and, since a large majority of the Legislature were Eastern members, the chances of a fair apportionment were meagre. The great misfortune was that the Convention could not agree upon some constitutional basis, and it is a noteworthy fact that but for slave property a basis of representation would probably have been embodied in the constitution.

## CHAPTER V.

### THE STEPS TO THE CONVENTION OF 1850-51.

The adoption of the new constitution by no means settled the basis question. The reapportionment was far more equitable than the previous county system, and for that reason the West was quieted for a while. The accusation was still brought, however, that the power was too thoroughly centered in the wealthy classes of the East, and the advocates of internal improvements saw that no great scheme could be carried through, while much money would be wasted by the iniquitous "log-rolling" system. Internal improvements became the principle of division between the sections. Western Virginia was undeveloped, and the wealth of that section was too small for extensive works to be executed by private enterprise, so the fight in the Legislature was for State appropriations to assist in the work.<sup>1</sup> All the power being in the hands of the East, these appropriations were hard to get, hence the West felt bitterly the apportionment of representation. Eastern Virginia was in a state of premature decay, and the West claimed that this condition was due to the commercial non-intercourse of the two sections.<sup>2</sup> An effort was made to

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<sup>1</sup> *Enquirer*, Jan. 27, 1831.

<sup>2</sup> *Enquirer*, Feb. 8, 12, March 15, Dec. 28, 1831; Jan. 5, 7, 10, 31, Feb. 4, 1832. The intercourse was so poor that in going from the eastern to the western portion of the State one was often compelled to go through Maryland and Pennsylvania. Western Virginia trade went to Baltimore. In 1831 an internal improvement convention was held at Lewisburg, which emphasized the decline of Eastern Virginia and the necessity for closer connection between the sections. A scheme was proposed to have a canal



establish a commercial route between the sections, but the Eastern majority in the Legislature strenuously opposed large appropriations; so the scheme finally came to naught.<sup>1</sup> The question was one of great importance, and *The Enquirer*, the leading paper of the State, declared in favor of giving the West an Eastern market, instead of letting the trade go to Baltimore.<sup>2</sup> The situation was grasped by some Eastern Virginians, who saw that either Norfolk or Baltimore had to be the emporium for Western trade, and that without a liberal policy on the part of the General Assembly it was sure to be Baltimore.<sup>3</sup> The politicians of Eastern Virginia, however, took too much of a local view of the matter, so that great schemes of internal improvements were appealed for in vain. Every section was for itself, and the interest of the State, as a whole, was overlooked. In vain did the people of the West try to

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from Richmond to Lynchburg, and a railroad from there to the Ohio River. (See memorial in *Jour. H. of Del.*, 1831-32, Doc. No. 8.) The Western people persisted in efforts for these improvements, and said that the "mongrel principle" of representation prevented them from accomplishing their purposes, and that they hoped the East would show a spirit of liberality. (*Enquirer*, Jan. 31, 1832.)

<sup>1</sup> *Jour. of H. of Del.* (1831-32), p. 131. The matter was before the Assembly frequently, and they acted favorably on it, but never pushed it with energy.

<sup>2</sup> Editorial in *Enquirer*, June 1, 1832.

<sup>3</sup> *Enquirer*, June 8, 1832. It seems plain to us that an effective commercial route connecting the East and West would have been the making of Norfolk and Richmond, but sixty years ago Eastern Virginians failed to see it. On the other hand, they argued that it would be to their interest to keep out Western products, as the prices of their products would be reduced. (*Enquirer*, May 17, 1833.) The truth is: Eastern Virginia was, at the time, essentially an agricultural section, and a man's highest ambition was to be a large slave-holding planter. The profits to the State, as a whole, to be gained by making the towns centres of trade and industries, were seen by few in the East, and the result was that few efforts were made to advance the interests of the cities. In 1833 a traveller in the Valley might see long trains of wagons winding their way to Baltimore instead of to Richmond. (*Enquirer*, May 17, 1833.)

enlist the East in their schemes of improvements,<sup>1</sup> but they could succeed in getting only small appropriations by means of the so-called "log-rolling."<sup>2</sup> The importance of the subject of internal improvements<sup>3</sup> in connection with representation is this: The Western people finding that their desires for internal improvements were not going to be granted, began within ten years after the adoption of the new constitution to agitate the basis question once more. They wished to have representation based on white population so that they might have the power to execute their own measures in spite of the opposition of the East.

During the period from 1830 to 1850, there was strong feeling of jealousy between the sections of the State, and much talk of separation on the part of the West.<sup>4</sup> Yet there is no

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<sup>1</sup>The papers of the West, *The Kanawha Banner* and *The Wellsburg Republican*, entreated, even demanded, a liberal and enlarged system of internal improvements. Meetings were held in many places to arouse interest in the proposed commercial route. (*Enquirer*, Sept. 13, Oct. 18, 25, 1833, and Sept. 9, 1834.)

<sup>2</sup>The principle of "log-rolling" was that sections having pet schemes would unite and pledge themselves to vote for each other's schemes, and thus get a majority. Piedmont was very anxious for internal improvements, and would often combine with the West, promising some petty appropriations for its support. Tidewater always resisted these measures.

<sup>3</sup>The question of internal improvements was one of some importance several years before the Convention of 1829-30, but it was not till 1831 that the matter began to attract so much attention, which it continued to do for a quarter of a century. Conventions after conventions were held on the subject. An examination of *Enquirer* from 1830 to 1850, the *Reports of the Board of Public Works*, the *Journals and Documents of the House of Delegates* and the *Governors' Messages*, shows how much the matter was agitated in Virginia.

<sup>4</sup>Lewis: *Hist. of West Virginia*, pp. 323-325. He tells us that separation was agitated principally by the politicians west of the Alleghany; (1) because so much money was appropriated for internal improvements in the East, while a Western delegate had to be satisfied with a few hundred dollars for a mud turnpike; (2) because all the public buildings were in the East except the Insane Asylum at Staunton; (3) because from 1776 to 1850 the West had been politically ostracized. The West had in this period only two United States Senators, Moore and Pennybacker (Lewis says one,

doubt that a majority of the Western people remained firm in their allegiance to their mother State. They turned their eyes, however, to another constitutional convention to redress their grievances. Equal political rights, equal representation on the white basis, became their cry.

The Legislature of 1839-40 had the subject of representation brought before it. Two fruitless attempts were made to take some action on the matter; one for a constitutional convention,<sup>1</sup> the other for reapportionment of representation by the Legislature.<sup>2</sup> The session of 1841-42 was also petitioned by many counties to reapportion representation throughout the State,<sup>3</sup> and a special committee was appointed to consider the matter.<sup>4</sup> It reported for a reapportionment on the suffrage basis (*i. e.*, on the qualified voters of the State).<sup>5</sup> A minority report made

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Moore; for election of Pennybacker, see *Jour. H. of Del.*, 1845-46, p. 20), and both from the Valley. Only one man was governor from the section west of the Alleghany. This was Joseph Johnson who was not governor till 1850. The *Enquirer* in 1845 had begged the Legislature to recognize the West, and elect a governor from that section. (*Enquirer*, Nov. 2, 1845.)

<sup>1</sup> *Enquirer*, Feb. 23, 1841.

<sup>2</sup> *Enquirer*, Feb. 26, 1841. The West, according to the census of 1840, had a white population of 371,570, and the East, 369,398; so that in a House of Delegates of 134, the West on this basis would have been entitled to 67 instead of 56, and in the Senate of 32 to 16 instead of 13.

<sup>3</sup> *Enquirer*, Jan. 6, 18, 22, March 1, 1842. Sixteen petitions. Some were bitter, declaring that, as representation stood, the Western people were but slaves of the East. (See Lewis County Resolutions: *Enquirer*, March 1, 1842.)

<sup>4</sup> *Enquirer*, Jan. 6, 1842.

<sup>5</sup> The tenor of the report was that the West in 1840 had a small majority of the white population; that, since every voter had the same right at the polls, every voter should be equally represented. Representation as it then stood, gave the East (with a voting population of about 44,032) 78 delegates, and the West (with a voting population of 42,016) only 56 delegates. Each Eastern delegate represented 564 voters, at which ratio the West should have had 74 instead of 56 delegates; or, in other words, the 56 delegates from the West at the ratio of 564 voters for each delegate, represented only 31,584 voters of the 42,016, thus leaving about one-fourth of the qualified voters of the West unrepresented. (See Report of Committee: *Enquirer*, Jan. 27, 1842.)

by the Eastern members of the committee advocated the mixed basis; and, since the apportionment, as it then stood, was practically on that basis, no change at all was thought desirable.<sup>1</sup> Thus the old fight was once more to be waged, and it was still to be a contest between the sections. The West, having a slightly larger white population than the East, contended for the larger representation. The East, paying twice as large a *per capita* tax, claimed the larger representation. In spite of the efforts made by the Western members of the House of Delegates, the matter was postponed indefinitely.<sup>2</sup>

This aroused the West. In the summer of 1842, the struggle over representation was continued with renewed energy. The Western newspapers advised the people to throw aside all party affiliations and, whether Democrat or Whig, to concentrate their forces for Western rights. Feeling ran so high that separation was feared.<sup>3</sup>

The people of Kanawha County held a public meeting to discuss representation. A committee of correspondence, consisting of ten men, was appointed to issue an address.<sup>4</sup> This address stated that great wrongs were being perpetrated on the West, and that there was no hope of the Legislature doing

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<sup>1</sup> The minority report claimed that "persons and property are alike subjects of legislation and entitled to like protection." The East paid more taxes than the West, and should have more representation. Taxation *per capita* in 1841 was for Tidewater, \$1.2125; for Piedmont, \$1.1044; for the Valley, \$0.7171; and for the Trans-Alleghany, \$0.3910: *i. e.*, for the East, \$1.1543, and for the West, \$0.5913. (Minority Report: *Enquirer*, Jan. 27, 1842.)

<sup>2</sup> The vote for postponement was 68 to 56. (*Enquirer*, March 10, 1842.) The Eastern members asserted that the West should not force a reapportionment upon them. A bill to call a constitutional convention was brought in, but was defeated by a vote of 66 to 57. The Western members were so enraged that fifty of them placed a protest on the *Jour. of H. of Del.*, because of the refusal to consider the plan for reapportionment, or for a convention. The protest declared that there was a fixed determination on the part of the East to ignore the West and not to equalize representation at all. (*Enquirer*, Feb. 17, March 10, 29, and April 1, 1842.)

<sup>3</sup> *Enquirer*, July 12, 1842.

<sup>4</sup> *Ibid.*



justice. The people of Western Virginia were asked to send delegates to a convention at Lewisburg to consider representation.<sup>1</sup> Accordingly, a convention met in Lewisburg, August 1, 1842. Twenty counties were represented by some fifty or sixty delegates.<sup>2</sup> Resolutions were adopted asking the Legislature to pass a bill, submitting to the vote of the people the question of a constitutional convention to equalize representation on the white basis.<sup>3</sup>

At the next three sessions of the General Assembly, efforts were made to pass a bill for a constitutional convention, but all in vain.<sup>4</sup>

In 1845, the state of representation was warmly discussed. The *Enquirer* came out in forcible terms against the existing system of representation, and said it was folly for the East to try to keep the system unchanged, since it engendered discord, and produced such a strong local and sectional feeling.<sup>5</sup> To

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<sup>1</sup> *Ibid.*

<sup>2</sup> The counties were Harrison, Monongalia, Ohio, Montgomery, Cabell, Mercer, Kanawha, Logan, Greenbrier, Monroe, Alleghany, Fayette, Randolph, Wood, Wythe, Mason, Jackson, Page, Augusta and Wayne. (*Enquirer*, Aug. 18, 1842.)

<sup>3</sup> *Enquirer*, Aug. 19, 1842.

<sup>4</sup> At the session of 1842-43 the proceedings of the Lewisburg Convention were presented, and petitions from Scott, Harrison, Monongalia, Randolph, Marion, Lewis and Greenbrier counties, asking for a convention. Western members worked hard, but the convention bill was defeated in the House of Delegates by a vote of 66 to 55 (a sectional vote). (*Enquirer*, Dec. 13, 15, 1842; Jan. 14, Feb. 2, March 4, 9, 1843.) At the session of 1844-45 petitions for a convention were presented from Hampshire, Lee, Isle of Wight, Fairfax and Monongalia. A special committee was appointed to consider them. It reported in favor of a bill to submit the question to the people, but the matter was indefinitely postponed in the House of Delegates by a vote of 64 to 63. (*Jour. of H. of Del.* (1844-45), pp. 17, 18, 23, 53, 86, 25, 27, 44 and 106: also Bill No. 23, appended to *Journal*.)

<sup>5</sup> Editorial in *Enquirer*, July 22, 1845. This pointed out that the Constitution of 1829-30 created, instead of reducing, a stronger sectional feeling, in that it divided the State into four divisions on the supposition that they had conflicting interests. Thus there were, so to speak, separate states confederated together in one, and each section was made to believe,

show the condition of the State in 1845, I quote the following: "The section below Tidewater which was once populous is in many places almost deserted. The property and the wealth are shifting to other divisions. The section beyond the Alleghany, once the resort of the wolf and the bear, is fast filling up with an industrious, high-souled, thriving population whose wealth is rapidly accumulating and whose immense resources are being daily more and more developed, and yet the same ratio is to be preserved. The people of the East may rely upon it, this state of things cannot last, this injustice will not be submitted to."<sup>1</sup> These utterances are very significant considering that they are from an editorial in an Eastern newspaper.

Memorials were now circulated in the State, some for and some against a convention. County meetings were held in regard to the basis question.<sup>2</sup> One section was arrayed against the other. The West was unanimously in favor of the white basis. From the newspaper discussions we are able to get the following in regard to the East: (1). A majority was opposed to a constitutional convention to settle the basis question.<sup>3</sup>

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unless an improvement was brought within it, it was being taxed for the benefit of the others entirely. The same editorial spoke of the absurdness of an apportionment, by which it mattered not how much the population or wealth of a section might change, yet representation must remain unchanged.

<sup>1</sup> *Enquirer*, July 22, 1845.

<sup>2</sup> *Enquirer*, July 29, Aug. 1, Nov. 25, 28, 1845. The Resolutions of Kanawha County illustrate well the Western position. They stated that the system of representation as it stood was an injustice to the West; that the *white basis* was the only one that would satisfy that section, but it was willing to give a guarantee to the East that slave property should not be overtaxed by the "adoption of a uniform system of *ad valorem* taxation." (*Enquirer*, July 29, 1845.) Amelia County resolutions show that the East distrusted the West, and was opposed to a convention; (1) because, if the West had control of legislation, appropriations for internal improvements would be too large; and (2) because the East with six times as many slaves as the West, could not afford to let the government pass from its hands. (*Enquirer*, Aug. 1, 1845.)

<sup>3</sup> *Enquirer*, Aug. 5, 1845. Some went so far as to denounce the Western people as would-be tyrants, wishing only to get hold of the pocket-book of the East.

(2). Quite a respectable element was for taking the sense of the people on a convention; and, since the East held the Legislature, it could control the convention and adopt its own basis.<sup>1</sup> (3). Some in the East preferred separation from the West to a surrender of their principles.<sup>2</sup> (4). Others favored a convention with the express understanding that the *mixed basis* was to be adopted.<sup>3</sup> (5). A few Eastern men favored a convention to adopt the *white basis* with a guarantee that slave property should not be overtaxed by the insertion in the constitution of a clause for *ad valorem* taxation on all kinds of property.<sup>4</sup>

On the opening of the General Assembly (1845-46), Governor McDowell in his message urged that the convention question be submitted to the vote of the people.<sup>5</sup> Some petitions were presented asking for a convention.<sup>6</sup> A bill was reported for taking the vote of the people, but it also provided that should the people decide for a convention, the organization of it should be on the *mixed basis*.<sup>7</sup> This was an Eastern

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<sup>1</sup> *Enquirer*, Sept. 2, and Oct. 30, 1845 (Fairfax Resolutions.)

<sup>2</sup> *Enquirer*, Sept. 2, 1845. At this time the desire for a division of the State was quite strong in the West. (Resolutions of Greenbrier County, *Eng.*, Sept. 2, 1845.) A majority of the Western people, however, were opposed to a division. (*Eng.*, Nov. 4, 1845.)

<sup>3</sup> *Enquirer*, Oct. 4, 10, 1845, and (Resolutions of Brunswick), *Enquirer*, Sept. 30, 1845.

<sup>4</sup> *Enquirer*, Aug. 12, 22; Sept. 26; Oct. 10, 1845. There is no doubt, however, that a majority of the Eastern people opposed a convention. They saw that the chief desire was to change the basis of representation; and, although they favored other reforms, they preferred to endure the existing evils in order to keep representation unchanged. *Enquirer*, Nov. 7, 1845, and (Cumberland Resolutions) *Enquirer*, Nov. 18, 1845.

<sup>5</sup> The Governor said that the people were the actual parties of the government, and that the Legislature had no right to refuse to let the sovereigns hold a conference on a convention. He wished to see the principal question of dispute, the basis of representation, rearranged in an amicable and satisfactory way, so that the political divisions as they then stood might be forever obliterated. *Jour. of H. of Del.* (1845-46), pp. 14, 15.

<sup>6</sup> *Journal*, pp. 18, 26, 28.

<sup>7</sup> *Journal*, 20; Bill No. 132 (appended to *Journal*): *Enquirer*, Dec. 5, 1845; Jan. 31, 1846.

measure to get control of the proposed convention. The West offered a substitute to have the convention organized on the white basis, claiming that a constitutional convention should be controlled by a majority of the citizens and not a minority.<sup>1</sup> This substitute was defeated by the Eastern members.<sup>2</sup> The whole matter was then indefinitely postponed.<sup>3</sup> There is no doubt that the bill would have passed, had the West been willing to accept the mixed basis for the organization of the convention. But a majority of the Western delegates was in favor of a convention on the white basis or none. The Eastern members would not grant this, and some even asserted that rather than have a convention on the white basis, they would prefer a division of the State.<sup>4</sup>

The discussion, and county meetings and resolutions of 1845, had had no effect. The West could have had a convention, but refused it unless on the white basis. Some of the Western people, however, wanted a convention on any basis, and criticised their delegates for having stood so firmly for the white basis only. Yet a majority in the West did not care for a convention without their plan of organization.<sup>5</sup> A change now occurred, and the East took a firm stand for a convention,<sup>6</sup> but to be organized on the mixed basis. In the West there was a want of harmony: some favored a postponement of a con-

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<sup>1</sup> A minority report, Document No. 27 in the Appendix to *Journal: Enquirer*, Jan. 31, 1846.

<sup>2</sup> *Journal*, pp. 143, 144. An attempt was made to let the people decide on what basis the convention should be organized, but the Eastern members voted this down. (*Journal*, p. 124.)

<sup>3</sup> *Journal*, pp. 144, 155; *Enquirer*, Feb. 20, 1846. The motion for postponement was made by Mr. Flowers of Harrison County, and 31 out of the 56 Western delegates voted for it. Another attempt was made for a convention. A bill to submit simply the question of a "Convention" or "No Convention" was introduced, but this was not satisfactory as neither the East nor the West was willing to pass a bill which did not provide the basis of organization for the convention.

<sup>4</sup> *Enquirer*, Feb. 20, 1846.

<sup>5</sup> *Enquirer*, Feb. 27, March 6, 1846.

<sup>6</sup> *Enquirer*, March 16, 31; May 12, 1846.



stitutional convention till after the census of 1850, which would show more plainly the great inequality in representation; others rather than have no convention were for the legislative basis (*i. e.*, delegates apportioned for the convention just as they were in the House of Delegates); others for white basis only as the plan of organization; while others were for any basis of organization, provided they got the convention for reforms.<sup>1</sup> Once more counties began to hold meetings on the question of representation and a constitutional convention. The spirit displayed in the West seemed more liberal than ever, and some of the western counties passed resolutions in favor of a compromise basis for a constitutional convention.<sup>2</sup>

A convention<sup>3</sup> to discuss the question of representation met at Staunton in December, 1846. Some sixty delegates were present, representing some eighteen or twenty counties. Resolutions were passed, asserting that the white people were the only parties in the social compact, and that they only ought to be recognized as a basis for apportioning representation throughout the State. The resolutions also expressed opposition to a constitutional convention (unless organized on the white basis) until after the census of 1850.<sup>4</sup>

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<sup>1</sup> *Enquirer*, Aug. 28, 1846.

<sup>2</sup> Resolutions of Ohio County (*Enq.*, Aug. 28, 1846), and of Marshall County (*Enq.*, Dec. 2, 1846). The *Enquirer* (Sept. 1, 1846) quotes the *Wheeling Argus* as advocating a compromise basis for a convention. This paper (*Argus*) proposed Federal Numbers. The parties in the West, according to it were: (1) *Reformers*, for white basis or none; (2) *Divisionists*, who wanted a separate State; (3) *Reformers* (conservative), for a convention on any basis and for all reforms that they could get; and (4) *Federalists*, for Federal Numbers as a basis for a constitutional convention and the same for the basis of representation in the General Assembly.

<sup>3</sup> A convention to meet at Staunton in August had been proposed by Berkeley County, but so much discussion occurred as to when and where it should meet, and so many different propositions were made in newspapers, that very few delegates assembled at Staunton in August, so they adjourned to reassemble in December. (*Enquirer*, July 29; Aug. 1, 11, 28, 1846.)

<sup>4</sup> Proceedings of Staunton Convention: *Enquirer*, Dec. 15, 1846.

At the next three sessions of the Legislature, bills were introduced to call a constitutional convention, but on each occasion they were rejected.<sup>1</sup>

Eastern Virginia now began strongly to advocate a constitutional convention, not to grant the demands of the West on representation, but to institute other reforms.<sup>2</sup> The matter was urged by the press in all parts of the State.<sup>3</sup> When the Legislature met in December, 1849, the Governor's Message brought to its attention the expediency of a convention for

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<sup>1</sup> At the session of 1846-47, the Governor in his Message advised a convention. (*Enquirer*, Dec. 8, 1846.) The matter was considered by the House of Delegates. There was great division among the Western members. Some favored taking the sense of the people without any plan of organization for the convention, while others were for postponing the question till after the census of 1850, and expressed fear that the East would force a convention upon them before that time. (*Enquirer*, Dec. 10, 15, 1846; Jan. 30, 1847.) At the session of 1847-48, an attempt was made to reapportion representation, and a committee was appointed, but at its request was discharged. (*Enquirer*, Jan. 21, 1848.) At this session the West became incensed at an action of the East. The constitution provided that the number of delegates from the different sections should neither be increased nor diminished except by two-thirds vote of the Legislature. But now one delegate was given to Alexandria, which had just been given back to Virginia by the Federal Government. This increased the Eastern delegation by one, making the House of Delegates 135. Mr. J. M. Stephenson, a Western delegate, entered a protest, declaring the whole proceeding unconstitutional, since it had passed by a vote of 60 to 59, and not a two-thirds vote. The West considered this an act of injustice. (*Enquirer*, Dec. 21, 27, 1847; Feb. 25, 1848.) At the next session (1848-49), Governor Smith in his Message advised a convention; a committee was appointed, but reported that it was inexpedient to call a convention at that time, so the matter was dropped. (*Jour. of H. of Del.*, 1848-49, pp. 29, 115, 117, 326.)

<sup>2</sup> Eastern reformers were for: (1) extension of suffrage and prevention of double voting, (2) reform in county courts, (3) limitation on the Legislature in regard to taxation, (4) reform of the judicial system, (5) abolition of Executive Council, and (6) election of Governor and other officers by the people. (Resolutions of Powhatan County; *Enquirer*, Jan. 22, 1850.)

<sup>3</sup> *The Charlottesville Jeffersonian, The Lynchburg Republican, The Petersburg Republican, The Lynchburg Virginian, The Danville Register, The Staunton Vindicator and The Rockingham Register* as quoted by *Enquirer*, Dec. 4, 14, 21, 28, 1849.

reform.<sup>1</sup> The House of Delegates took the matter up, and appointed a committee to bring in a bill.<sup>2</sup> The bill, as reported, was to submit to the vote of the people two questions: (1) whether there should be a constitutional convention or not, and (2) whether it should be organized on the white or mixed basis.<sup>3</sup> The Western members spoke for a convention, but said that, while the East wanted reform in the judicial system, etc., they wanted a change in representation, and would not be satisfied with the mixed basis for the organization of the convention, but were willing to take the vote of the people to decide what basis should be used.<sup>4</sup> However, the Eastern members moved and carried a substitute adopting the mixed basis for the convention.<sup>5</sup> The convention bill, thus amended, passed the House of Delegates by a vote of 78 to 42,<sup>6</sup> and the Senate by 17 to 11.<sup>7</sup> The act provided that, at the April elections (1850), the vote of the people should be taken on a constitutional convention, and that the returns be made to the Governor, who, on or before the third Monday in June, should proclaim the result. If a majority was found for a convention, on the fourth Monday in August an election was to be held for delegates. The total number of delegates was to be one hundred and thirty-five. The act then enumerated the districts and the number of delegates for each.<sup>8</sup> The supposed white population in 1849 was 887,717, and the Revenue

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<sup>1</sup> Governor Floyd's Message, *Documents of H. of Del.* (1849-50): Doc. No. I, p. 10.

<sup>2</sup> *Enquirer*, Dec. 7, 1849.

<sup>3</sup> *Enquirer*, Feb. 26, 1850.

<sup>4</sup> *Enquirer*, Dec. 7, 1849.

<sup>5</sup> *Enquirer*, Feb. 12, 1850. The vote was 65 to 57. The Western members voted unanimously against it.

<sup>6</sup> *Enquirer*, Feb. 19, 1850. Most of the votes against a convention were from the West, but some twenty voted for it, as they preferred a convention on the mixed basis to none at all.

<sup>7</sup> *Enquirer*, March 15, 1850. The 11 votes against the convention were from the West.

<sup>8</sup> *Acts of Assembly* (1849-50), p. 9, *et seq.*

Tax was \$472,516.31 ;<sup>1</sup> and, since the apportionment for the convention was to be on the mixed basis (taxation and white population combined) every \$7000.24 elected one delegate, and every 13,151 white persons, one delegate. This meant that in the convention every white person was to have just a little more than half as much weight as a dollar in taxes. The apportionment was for Tidewater, thirty-eight delegates; Piedmont, thirty-eight; the Valley, twenty-four, and the Trans-Alleghany district, thirty-five. Had the apportionment been on the white basis, Tidewater would have had twenty-nine; Piedmont, thirty-two; the Valley, twenty-five, and the Trans-Alleghany district forty-nine.<sup>2</sup> In other words, the convention organized on the mixed basis was to have seventy-six delegates from the East and fifty-nine from the West, an Eastern majority of seventeen; but on the white basis, the East would have had only sixty-one, and the West seventy-four, a Western majority of thirteen. No wonder the West fought so hard for the white basis and said so much against the East.<sup>3</sup> On the other hand, is it strange that the East,

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<sup>1</sup> Doc. No. 31, *Documents of H. of Del.*, 1849-50.

Tidewater district had a white population (1849), 192,660, and paid taxes (1849) \$163,977.25.

Piedmont district had a white population (1849), 209,970, and paid taxes (1849) \$155,512.07.

Valley district had a white population (1849), 160,557, and paid taxes (1849) \$77,512.36.

Trans-Alleghany district had a white population (1849), 324,530, and paid taxes (1849) \$75,454.63.

<sup>2</sup> Cf. Documents Nos. 31 and 40; *Documents of H. of Del.*, 1849-50.

<sup>3</sup> *Enquirer*, Feb. 22, 26; March 1, 1850.

Many Western members of the General Assembly denounced in strong terms the action of the Eastern members in forcing upon them a convention on the mixed basis simply (as they thought) to protect slaves. They were hurt to think that the East could not trust them for fear they would be plunderers of property. A bitter feeling existed, and fear was expressed that the Trans-Alleghany section would not submit to the convention plan at all. The reforms advocated at this time by the East (*i. e.* extension of suffrage, election of Governor and county officials by the people, etc.) were



paying twice as large a tax as the West, and conscientiously believing that property should be an element in representation, should have striven for the mixed basis?

The fight over the convention was quite vigorous throughout the State. Many in the West were endeavoring to defeat the measure,<sup>1</sup> while the East hoped to have the convention bill approved by the people.<sup>2</sup> When the elections were held in April, quite a good majority was cast in favor of the convention.<sup>3</sup> With some exceptions the counties in the Trans-Alleghany district gave large majorities against the convention,<sup>4</sup> but the whole Valley and all the Eastern counties except two<sup>5</sup> were in favor of the convention.

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for the most part what had been championed by the West in the Convention of 1829-30, and were conceded to be the true republican principles. But that representation should be based on the white population, the East as yet did not accept, and the West believed that it was not from principle but from distrust.

<sup>1</sup> The West opposed the measure, thinking it a trick on the part of the East to have a convention before the census of 1850, and also that the mixed basis of organization was only an indication of what the East would put in the new constitution. (*Enquirer*, March 5, 1850.) The West wanted the people to vote on the basis question, and, since the East was afraid to allow this, it talked of separation. (*Enquirer*, April 9, 1850.) The Trans-Alleghany district was especially opposed to a convention organized on the mixed basis, because each of its delegates would represent 9,292 whites, while each Tidewater delegate would represent only 5,070 whites. (Doc. No. 40, p. 9: *Documents of H. of Del.*, 1849-50.)

<sup>2</sup> The people of the East were urged to vote for a convention, since there was no fear that the West would control it; that then was the chance to get the mixed basis adopted and to put through some needed reform. (*Eng.*, April 18, 1850.) There was also a desire in the Valley for the convention. The population and wealth of the Valley was such that either the white or mixed basis gave it practically the same representation, hence this portion of the West, though preferring the white basis, voted for the convention. (*Enquirer*, April 19, 1850: Doc. 30, *Documents of H. of Del.*, 1849-50.)

<sup>3</sup> Returns (MS.): *State Papers* (1850). Returns are wanting for 9 counties: 4 from the Trans-Alleghany, 3 from the Valley, and 2 from the East.

<sup>4</sup> Returns for 43 counties west of the Alleghany. Twenty-nine gave majorities against the convention, and in these only a few votes were cast for the convention.

<sup>5</sup> Warwick and Amelia counties.

In August delegates were elected to the convention. The candidates declared through the papers, and on the stump, their views on the basis question, which was made the main issue in the elections.<sup>1</sup> In the East only one man came out in violent opposition to the mixed basis.<sup>2</sup> This was Henry A. Wise of Accomac. He advocated the *suffrage basis* which the West had advocated in the Legislature of 1841-42. He wanted, however, a constitutional guarantee to prevent excessive taxation.<sup>3</sup> The West rejoiced in the support of so eminent a man, but in the East he was spoken of as the "modern Jack Cade."<sup>4</sup> Yet Wise was so popular among his constituents, that, in spite of the fact that his views were contrary to theirs, he was elected a member of the convention. He was the only man elected in the East in opposition to the mixed basis.<sup>5</sup> Not a member elected from the West favored the mixed basis.

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<sup>1</sup> *The Whig* (June 1, 18; July 4, 9, 12, 16, 17, 19, 23, 26, 30, 31; Aug. 6, 9, 13, 20, 1850) contains announcements from candidates advocating the mixed basis and letters to the number of twenty-seven. *The Whig* was for the mixed basis or none. For the white basis we find in *The Whig* of the above dates only three articles, two of these announcements from candidates.

<sup>2</sup> See his Announcement: *Whig*, June 1, 1850.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Whig*, June 18, July 19, 1850.

<sup>5</sup> *Whig*, Sept. 13, Oct. 18, 1850.

## CHAPTER VI.

### THE REFORM CONVENTION OF 1850-51.

The Convention met in Richmond on the 14th of October, 1850. Of the one hundred and thirty-five members, six had been members of the Convention of 1829-30.<sup>1</sup> John Y. Mason was elected President.<sup>2</sup> It was decided to wait for the census, so the Convention adjourned November 4, 1850, and reassembled January 6, 1851, and remained in a continuous session till August 1, 1851. This Convention is usually spoken of as the "Reform Convention" because of the many salutary reforms accomplished.<sup>3</sup> The fight was chiefly on the basis of representation, which consumed most of the time and attention of the Convention. Eight committees were appointed to consider the different questions of interest.<sup>4</sup> The most important was the "Committee on the Basis and Apportionment of Representation," consisting of twenty-four members. George W. Summers of Kanawha was Chairman. This Committee reported February 6, 1851.<sup>5</sup> It was unable to agree, one half holding to one basis, while the other half advocated a different basis. Two propositions were, therefore, submitted; one

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<sup>1</sup> John Y. Mason, William O. Goode, J. Boyer Miller, James Saunders, William Smith and Archibald Stuart. Cf. Lists: *Proceedings and Debates of Convention* (1829-30), pp. 3, 4, and *Journal of Convention* (1850-51), pp. 423, 424.

<sup>2</sup> *Journal*, p. 5.

<sup>3</sup> Extension of suffrage, Governor to be elected by the people, abolition of the Executive Council, reform of the judicial system, and the election of county officers by the people.

<sup>4</sup> *Journal*, pp. 58, 59.

<sup>5</sup> *Journal*, p. 107: *Debates*, pp. 145, 146.

marked "A," that advocated by the Eastern members of the Committee, and the other marked "B," the Western proposition.<sup>1</sup>

Proposition "A" was a House of Delegates of one hundred and fifty members chosen biennially, and a Senate of fifty-one chosen for four years. Both houses were to be apportioned on the mixed basis, and, in 1862 and every ten years after, a reapportionment was to be made on this basis.<sup>2</sup> Proposition "B" was a House of Delegates of one hundred and fifty-six, and a Senate of thirty-six. The qualified voters were to be the basis of representation (suffrage basis). The apportionments reported with "B" were based on the white population which was to continue till an enumeration of the voters could be made; but, in 1855 and every ten years after, an enumeration of the qualified voters should be made, and the following General Assemblies were to reapportion on this basis.<sup>3</sup>

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<sup>1</sup>See the *Documents of Convention* for both propositions.

<sup>2</sup>One-seventy-fifth part of the whites was to elect one delegate, and one seventy-fifth part of the taxes raised by the Legislature (deducting therefrom all taxes on licenses and law processes) to elect one. The Senate was to be distributed in the same way. The amount of taxes was to be estimated by an average of the ten preceding years. The House of Delegates on this basis was: The West for a white population of 494,763 would have 41.42 delegates, and for \$185,316.37 taxes, 26.09 delegates, making 67.51; *i. e.*, 68, delegates. The East for a white population of 401,104, to have 33.58 delegates, and for \$347,348.09 taxes, 48.91 delegates, making 82.49; *i. e.*, 82 delegates. (See Proposition "A" in Appendix to *Journal*.) Thus the East had a majority of 14 with a white population less than the West by 93,559. The Senate on the same basis was to be 23 from the West and 28 from the East. This plan meant that every 70 cents in taxes was to have a representation equal to one white person. (Sheffey's *Speech*, p. 9: *Debates*.)

<sup>3</sup>*Journal* (Documents in Appendix): *Debates*, pp. 146-147.

By this plan every delegate was to represent 5,740 white persons, and every senator, 24,870. This gave the West 85 delegates and the East 71; the West 19 senators and the East 17. (Documents.) Now the mixed basis, as seen in the note above, gave the East in the House of Delegates a majority of 14, while the white basis gave the West a majority of 14; hence it is at once plain why the fight between the sections was so sharp.



The basis question was taken up in the Committee of the Whole, and, from the 17th of February to the 16th of May, the discussion was almost exclusively on this subject.<sup>1</sup> The debate<sup>2</sup> is too long for anything like a full synopsis, so only a few of the main features will be presented. The East advo-

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Here it may be well to state the sources for this Convention. There is a Journal in two volumes. The first volume contains the Journal proper and some documents, while the second volume contains documents only. In the Va. State Library there is one volume of the Debates of this Convention. This contains the speeches from Jan. 6, to Feb. 24, 1851. The rest of the debates, printed in the so-called "Supplement" which was sent out with all the newspapers, I have been unable to find.

<sup>1</sup> Every effort was made by both the East and the West to carry their points. Public meetings were held by the counties throughout the State to express their views and to instruct their delegates on the basis question. No less than 37 meetings were held while the Convention was in session. These were reported to the Convention and their resolutions printed in the papers. These were often bitter and opposed to any compromise. The Eastern counties contended for mixed basis or none, while the Western counties were for the white or suffrage basis. A good specimen of the Western resolutions is those of Pocahontas County, which, after stating that the East intended to force the mixed basis on the West, passed the following: "*Resolved*, That defective as is our State policy in many other respects, we regard the basis of representation as paramount to all others, and we will accept no constitution that does not contain the white population as the basis of representation in the councils of the State; and we hereby pledge ourselves to do everything in our power to defeat the adoption by the people of any constitution which does not confer equality of political right upon the people of every portion of the State." References for this note: *Journal*, pp. 107, 180, 192, 193, 185, 159, 233, 243, 244, 247, 251, 264, 265, 270; *Debates*, pp. 57, 100, 307; *The Whig*, April 8; May 13, 30; June 10, 13, 17, 20, 27; July 1, 4, 15, 22, 25, 1851.

<sup>2</sup>The debate was well arranged. To quote a contemporary account: "The Battle of the Basis is fought with as much science, system and leisure as the campaigns of Marlborough. The speeches are elaborate; they contain little that is new, or calculated to retain attention of men who have ridden on the basis, slept on the basis, dined on the basis for six months past!" (*Whig*, March 24, 1851.) The people of the State became tired of the debate, and even the members of the Convention paid little attention after they had made their speeches. "Those who have discharged their duty to their constituents, look with interest to the historical records of the forthcoming 'Supplement,' and chew peanuts in all the dignity of perfected renown." (*Whig*, March 24, 1851.)

cated the mixed basis on the following grounds:<sup>1</sup> (1). One principle of government is protection of property, and this can be done best by allowing it representation.<sup>2</sup> (2). The *white* or *suffrage basis* would give control to a section paying about one-third of the taxes, which would be unjust.<sup>3</sup> (3). By suffrage or white basis a *numerical* majority would rule, while a minority having a majority of interests and wealth would be ignored.<sup>4</sup> (4). It would be unsafe to trust the government to the West as it might increase the State's burdens for internal improvement.<sup>5</sup> (5). Western Virginia being essentially a non-slaveholding section, the government once in its hands might overtax or abolish slavery.<sup>6</sup> (6). The West traded with Baltimore; and, if it once controlled the government, appropriations might be made to extend the railroad connection between Winchester and Baltimore so as to take all the trade from the West and Southwest out of the State.<sup>7</sup>

<sup>1</sup> The speeches used on the mixed basis are those of Messrs. Stanard, Barbour, Perkins, Beale, and Scott of Fauquier.

<sup>2</sup> *Debates*, p. 284.

<sup>3</sup> *Debates*, p. 284.

<sup>4</sup> Barbour's *Speech*, p. 7 (in *Debates*).

<sup>5</sup> *Ibid.*, p. 10. The West offered guarantees to be embodied in the constitution that the burdens of the State should not be increased, and that slave population should not be overtaxed. The East considered these as nothing, as, the power once in the hands of the West, another constitutional convention could be called and all restrictions removed. (Barbour's *Speech*, p. 11.)

<sup>6</sup> Barbour's *Speech*, p. 12. There was a feeling in the West for the abolition of slavery. In 1832, when a bill was introduced in the Virginia Legislature to provide for the abolition of slavery every man from the West voted for it. The Trans-Alleghany district, if it continued to increase in population as it had, would at some day with the white basis have full control of the government, and this the East argued would be ruinous to slave property. (Stanard's *Speech*, p. 16.) The Trans-Alleghany district had, according to the census of 1850, only 24,436 slaves, and the rest of the State, 450,155 slaves. The white population west of the Alleghany was 331,586, and the rest of the State 567, 548. Distrust of this Trans-Alleghany section seems to be the main reason why the East stood for the *mixed basis* to protect property.

<sup>7</sup> Stanard's *Speech*, p. 20.

The West argued for the suffrage or white basis, and had a very staunch ally in Henry A. Wise, who evidently had considerable influence from the fact that, although he favored a Western measure, he was an Eastern man.<sup>1</sup>

The arguments<sup>2</sup> for the suffrage or white basis were somewhat as follows: (1). The government resides in the people, and the laws are for their protection. The origin of the social compact was for personal rights, the preservation of life and liberty, and not for the protection of individual property, as the right to separate or individual property was a concession of society.<sup>3</sup> (2). All voters in the eyes of the government should be equal, and, therefore, every voter should have an equal representation without regard to property.<sup>4</sup> (3). The mixed basis meant a rule of the minority which was unrepublican.<sup>5</sup> (4). Slave property would not be endangered by the suffrage or white basis. The Valley and some few of the Trans-Alleghany counties had so many slaves, that they with the East would amply protect slavery.<sup>6</sup> The *ad valorem* system

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<sup>1</sup> Wise spoke for five days. *The Whig* said his speech was revolutionary in doctrine and socialistic, and that the whole burden was abuse of the rich, the aristocrats. Yet we are told that his speech produced a great impression, and, though Booth was playing Hamlet at the theatre, Wise drew the crowd. His speech was spoken of as undoubtedly one of the best delivered. *Whig*, May 2, 1851.

<sup>2</sup> For these we have consulted the speeches of Messrs. Sheffey, Willey, Lucas, Carlile, and Smith of Greenbrier; also as much of Wise's speech as was accessible. George W. Summers was a faithful champion of the West, but we have not been able to find his speech.

<sup>3</sup> Sheffey's *Speech* (Appendix to *Debates*), pp. 3-5. Sheffey thought that the best plan was to refer the whole matter to the vote of the people; that they were the sovereigns and ought to decide what principle of representation they wanted.

<sup>4</sup> Proposition "B" in Documents. The suffrage basis was the Jeffersonian principle of representation, and was in accord with the natural rights of man. (*Debates*, p. 468.)

<sup>5</sup> Sheffey's *Speech*, p. 6.

<sup>6</sup> Sheffey (*Speech*, p. 16) said that the average portion of slave property was 33 per cent. Fifteen counties West had nearly this. These in a House of Delegates of 156, on the suffrage basis would have 22 delegates, and the East 70, so the slave portion of the State would dominate.

of taxation would be another protection. Whatever oppressed the majority in society would oppress the minority, and *vice versa*, when taxation is equal on all classes.<sup>1</sup> (5). The internal improvements would be benefited, "log-rolling" would be broken up, and the great schemes would be carried through at no greater cost.<sup>2</sup>

The arguments of both sides were repeated over and over again, each member feeling that it was his duty to add something to the debate for the cause of his constituents.

On the 17th of February (the day on which the debate began), Mr. Scott of Fauquier proposed a plan as a substitute for those reported by the Committee. This was nothing more than "A" (the mixed-basis plan) with restrictions on representation from towns, as was the case in South Carolina.<sup>3</sup> The debate continued on this till about the first of April, when some Eastern (mixed-basis) men expressed a desire for a compromise basis rather than restrict town representation.<sup>4</sup> It also became evident to some that, if the mixed basis was forced upon the West, it would result in a division of the State.<sup>5</sup> So, on the 21st of April, John Minor Botts proposed a compromise which was to give equal representation in both houses of the General Assembly to each of the great sections.<sup>6</sup> A vote was taken on propositions "B" (suffrage basis) and "C," and both were defeated.<sup>7</sup> Botts now withdrew his amendment to

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<sup>1</sup> Sheffey's *Speech*, p. 8.

<sup>2</sup> Sheffey's *Speech*, p. 12. It was further argued that the interests of the two great sections of the State were not so different that one section should be afraid to trust the other, and that, unless the Western people were treated as Virginians, and not as plunderers of property and abolitionists, a division of the State would ensue. (*Debates*, pp. 355-57.)

<sup>3</sup> See *Debates*, p. 254: also *Documents*, "C." <sup>4</sup> *Whig*, April 8, 1851.

<sup>5</sup> *Whig*, April 15, 1851 (Botts's Letter to his Constituents).

<sup>6</sup> See Botts's Amendment in *Documents*, and *Whig*, April 22, 1851. This plan was first suggested by Tazewell Taylor of Norfolk. (*Whig*, April 8, 1851.)

<sup>7</sup> *Journal*, Appendix, p. 3. Mixed-basis men voting against "C" were Messrs. Chilton, Bowden, Saunders, Botts and Randolph.



await the will of his constituents in Richmond, where a poll was to be taken on the basis question.<sup>1</sup> There was now much confusion.<sup>2</sup> No plan was being considered except proposition "A" (mixed basis). The East had the power to adopt this, but did not do so for fear the West would withdraw from the Convention.<sup>3</sup> At this point, May 8, Mr. Summers proposed as a compromise from the West that a constitution be adopted and submitted to the people without any basis, but, at the same time, that a separate poll be held to allow the people to decide between the *suffrage* and the *mixed* basis. This was rejected by the Eastern members.<sup>4</sup>

On the 9th of May a motion was made to strike out proposition "A," but failed by a vote of 58 to 62.<sup>5</sup> It seemed certain that the mixed basis would now be adopted; but the West became so aroused, and affairs were at such a crisis that, on May 10, when the Convention met, it was thought advisable to adjourn for the day.<sup>6</sup> A caucus was held by the mixed basis advocates, and they invited the suffrage-basis party to a conference.<sup>7</sup> Compromise propositions were then submitted by both sides.<sup>8</sup> A comparison of the plans shows that the

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<sup>1</sup> *Whig*, May 2, 1851.

<sup>2</sup> *Ibid.*

<sup>3</sup> *The Whig* (April 9, 1851, Remarks of Mr. Scott of Fauquier) states that a month before this the Governor-elect, Joseph Johnson, of Harrison County, and other members from his section had threatened to leave the Convention, and to advocate a division of the State unless the suffrage or white basis was adopted.

<sup>4</sup> *Journal*, Appendix, pp. 7, 8.

<sup>5</sup> *Ibid.*, pp. 9-10.

<sup>6</sup> *Whig*, May 27, 1851; Randolph's Letter to his Constituents: also Stanard's *Speech (Debates)*, p. 26.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Whig*, May 23, 1851; and Stanard's *Speech*, pp. 33-34. The East submitted the following plans of compromise: (1) House of Delegates, 156; suffrage basis: Senate, 50; taxation alone as basis. (2) House of Delegates, 150; 85 to West and 65 to East: Senate, 50, based on taxation only. In 1862 and every ten years after, the House to be apportioned on suffrage basis, and Senate on taxation. (3) House of Delegates, 150, on mixed basis; Senate, 50, on suffrage basis: Reapportionment every ten years on the same plan. The West proposed: (1) House of Delegates on mixed basis, and

East proposed no plan which would ultimately provide for the adoption of the suffrage or white basis, while the West was unwilling to accept anything which did not provide for the suffrage basis or for submitting the question to the vote of the people. The result of the conference, therefore, was that each side rejected the plans of the other. The Western members in their caucus then passed resolutions, declaring that they would not accept any compromise which did not eventually provide for the adoption of the suffrage basis or for submitting the question to the vote of the people.<sup>1</sup>

On the 12th of May a committee of eight was elected to prepare a compromise plan.<sup>2</sup> On the 15th of May they<sup>3</sup> reported a plan providing for a House of Delegates of one hundred and fifty members,—eighty-two from the West and sixty-eight from the East, and a Senate of fifty,—thirty from the East and twenty from the West. In 1865, the Legislature should reapportion representation in both houses, and, if unable to agree, the question was to be submitted to the people whether apportionments should be on the suffrage or mixed basis. This was rejected by the close vote of 55 to 54.<sup>4</sup> On motion of Henry A. Wise, proposition "A" which had remained before the Convention was rejected.<sup>5</sup> Botts's amend-

Senate on suffrage basis, but, in 1862 and every ten years after, both houses to be reapportioned on suffrage basis. (2) Same as the first, except in 1862 the vote of the people should decide whether the mixed or suffrage basis should be adopted. (3) House of Delegates, 156, on suffrage basis: Senate, 50, on taxation alone, but in 1862 both houses to be reapportioned on the suffrage basis. (4) Mixed basis for both houses till 1862, when both were to be reapportioned on the suffrage basis.

<sup>1</sup> *Whig*, May 13, 23, 27, 1851.

<sup>2</sup> Seeing that the Convention was in danger of separation on the basis question, Mr. Martin of Henry, a mixed-basis man, made the motion for this committee, four from the East, and four from the West. Messrs. Summers, Martin of Henry, Wingfield, Lucas, Finney, Caperton, Chilton and Letcher were elected by the Convention as this committee. (*Journal*, pp. 206, 208, 216.)

<sup>3</sup> All concurred except Finney. (*Whig*, May 16, 1851.)

<sup>4</sup> *Journal*, Appendix, pp. 11, 12.

<sup>5</sup> *Journal*, Appendix, p. 13.

ment was now brought up and rejected. Wise and Finney offered plans, but both were defeated. The proceedings became ridiculous, proposition after proposition being proposed and rejected.<sup>1</sup> Mr. Chilton now introduced a plan, the same as the report of the committee of eight, except, should the Legislature in 1865 fail to reapportion representation, the Governor should submit to the people four propositions: (1) the suffrage basis, (2) the mixed basis, (3) the white population and (4) taxation only. This was carried in the Committee of the Whole by a vote of 55 to 48.<sup>2</sup> In the Convention this was amended so that, should the Legislature in 1865 fail to agree on a reapportionment, each House should propose its schemes of representation, and transmit them to the Governor who should submit them to the vote of the people. If the Legislature neither apportioned representation nor proposed the schemes, then the Governor should submit to the voters the following: (1) The suffrage basis for both Houses; (2) the mixed basis for both Houses; (3) taxation only for the Senate and the suffrage basis for the House of Delegates, and (4) the mixed basis for the Senate and the suffrage basis for the House of Delegates. In case none of these propositions received a majority of the votes cast, the two having the largest number of votes were to be again submitted to the people.<sup>3</sup> As thus adopted, the clause on representation was embodied in the constitution with one change; namely, the House of Delegates was increased to one hundred and fifty-two, giving one delegate more to each of the two sections.<sup>4</sup> This compromise

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<sup>1</sup> *Journal*, Appendix, pp. 14-17.

<sup>2</sup> *Journal*, Appendix, pp. 18-22. The mixed-basis men who voted for it were Messrs. Arthur, Bowden, Chilton, Claiborne, Martin of Henry, Randolph and Wingfield. (*Whig*, May 23, 1851.)

<sup>3</sup> *Journal*, pp. 220-225.

<sup>4</sup> *Journal*, p. 409; *Code of Va.* (1860), pp. 39-43. The constitution provided that the General Assembly should meet biennially. The delegates were to be elected biennially, but the senators for four years, half every two years. Any qualified voter except a minister of the gospel, or an officer of a banking corporation, or an attorney for the commonwealth, could be a

gave the West eighty-three delegates and the East sixty-nine. The apportionment for the House was on the *suffrage or white basis*, according to the census of 1850. The Senate, thirty from the East and twenty from the West, was based on an arbitrary apportionment, giving a majority to the East less than on taxation alone, but twice as large as on the mixed basis.

The people of the East expressed strong disapproval of this compromise. They urged a division of the State rather than submit to it.<sup>1</sup> Every influence was brought to bear on the

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member of the House of Delegates, or of the Senate provided he was 25 years old.

Suffrage was extended to all persons (male whites) over 21 years of age. The Governor was to be elected for four years by the vote of the people.

<sup>1</sup> About 14 Eastern counties passed resolutions in opposition to this compromise, contending that the East should hold fast to the mixed basis and not yield anything to the West. Some counties urged their delegates to vote for a *sine die* adjournment of the Convention so as to keep the Constitution of 1830 in force, and some declared for a division of the State rather than accept a compromise. (*Whig*, May 30; June 5, 17, 24, 27; July 1, 4, 22, 1851.) Rockingham County, for instance, said that a division would be the "best solution of existing difficulties, and the most soothing compromise of conflicting and otherwise irreconcilable interests." Letters in the newspapers also show the Eastern opposition to the compromise. According to these the white basis had been really established, and slave owners would no longer be recognized in the government, and their property would be oppressed. (*Whig*, May 30, 1851.) Those Eastern Virginians who had voted for the compromise were branded as "base Judeans" and "vile traitors." (*Whig*, May 30, June 17, 27.) It was thought advisable to organize the two sections into two states, since the difference in the character and interests of the people was so great. The West would be an abolition state and would harbor fugitive slaves, but this would be better than Western domination. This, of course, was not the feeling of the majority of the Eastern people, but some of the older inhabitants have informed me that the sentiments expressed in these letters were prevalent in the East. The mere fact that Littleton W. Tazewell (*Whig*, July 1) should have advocated a division, and that resolutions passed by four Eastern counties, Southampton, Buckingham, King and Queen, and Mecklenburg (*Whig*, June 17, July 1, 4, 22) should have favored the same in preference to a surrender of the mixed basis, shows that the divisionists in the East were not wholly insignificant.



Convention to get it to reconsider the basis question,<sup>1</sup> but the Convention would not reopen the discussion, and the compromised plan, as stated above, went into the constitution which was adopted by the Convention, August 1, 1851.<sup>2</sup>

The new constitution, on the 4th Thursday in October, 1851, was ratified by an overwhelming majority, 75,748 votes being cast for ratification, and only 11,063 for rejection.<sup>3</sup> The West had won in the fight, and now had a majority of four on joint ballot of the two houses of the General Assembly. Under the former system of representation the West had only 41 per cent. of the members in the Legislature; it now had 51 per cent.

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<sup>1</sup> A public meeting in Albemarle by an almost unanimous vote instructed their delegate, T. J. Randolph, who had voted for the compromise, to move a reconsideration of the same. (*Whig*, May 30, and July 15, 1851.) Gloucester County asked its representative, Bowden, to resign. (*Whig*, June 10.) Wingfield, another Eastern man who had voted for the compromise, was requested by his constituents to move a reconsideration. (*Whig*, July 4.) These attempts were made several times, the last on July 26, just five days before the Convention adjourned *sine die*. (*Journal*, p. 385.)

<sup>2</sup> The vote for the final adoption of the constitution by the Convention shows that all the members from the West except one, and about one-half of the Eastern members voted for the constitution. (*Journal*, p. 419.)

<sup>3</sup> See Returns (MS): *State Papers* (1851). The small vote for rejection was principally in the East, but even here only five counties, Amelia, Louisa, Prince George, Southampton and Warwick, gave majorities for rejection. Others probably would have given majorities against the constitution, but for the fact that all to whom suffrage has been extended voted for the constitution. Suffrage was extended by more than 50 per cent. The newspapers from the adjournment of the Convention till the election in October show the state of feeling at the time. The East had cooled down, and did not urge the rejection of the constitution so violently as one might suppose after the heated strife in the Convention. However, we find some advocating the rejection of the constitution on account of the principles of representation, though the other reforms were considered wholesome. Yet all thought that the constitution would be adopted, and both the Democrats and Whigs held conventions, and nominated candidates for the offices to be filled under the new constitution, even before its ratification. (*Whig*, August 29; Sept. 20, 1851.)

The basis question was now settled, or rather a plan was adopted for its final settlement. Sectional feeling ceased. Every one rejoiced that at last there was peace in the State. A division, however, was near at hand, a division which showed that a greater part of the people of the Trans-Alleghany district, the section which the East claimed was especially antagonistic to slave property and filled with "Northern ideas," was really of a different sentiment from the rest of the State.

## CHAPTER VII.

### THE PRESENT SYSTEM OF REPRESENTATION.

The provisions of the Constitution of 1851 in regard to the basis of representation were never carried out. The secession movement came on, and February 13, 1861, a Convention was called at Richmond, which, after vain efforts for reconciliation, finally passed an ordinance of secession by a vote of 81 to 51.<sup>1</sup> The section west of the Alleghany Mountains opposed secession, so organized a government to act in concert with the Union, and called it the Government of Virginia.<sup>2</sup> Francis H. Peirpont was made Governor.<sup>3</sup> A constitutional convention was called, and a constitution for West Virginia adopted, February 18, 1862.<sup>4</sup> Then in May, 1862, a Legislature met at Wheeling, claiming to be the Legislature of Virginia, though composed entirely of men from the Trans-Alleghany counties (about one-third of the counties of the State), and passed a bill giving the consent of the *State of Virginia* to the

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<sup>1</sup> *Code of Virginia* (1873), pp. 2, 8.      <sup>2</sup> *Ibid.*, pp. 8, 9.      <sup>3</sup> *Ibid.*, p. 11.

<sup>4</sup> *Ibid.*, p. 13. In regard to representation this constitution stated that white population should be the basis. There were to be 18 senatorial districts as nearly equal as possible in white population, and in the House of Delegates every county was given a representative or representatives where it was possible. But where several counties were made into districts to equalize the population, the constitution provided for rotation between the counties in electing delegates in proportion to the population of each county. For example, if two counties together elected one delegate, and one county had twice as large a population as the other, a resident of the larger county was to be elected for two terms and a resident of the smaller county for one term. (West Va. Constitution: *Poore's Constitutions*, II, p. 1981.)

formation of this new State.<sup>1</sup> By a proclamation of the President of the United States issued the 19th of April, 1863, West Virginia was to become a part of the Union in sixty days after this proclamation.<sup>2</sup>

The Peirpont Government, having accomplished the dismemberment of Virginia, was, in 1863, transferred from Wheeling to Alexandria.<sup>3</sup> The General Assembly held at Alexandria passed a bill calling for a convention to frame a constitution for the remaining portion of Virginia.<sup>4</sup> A convention accordingly assembled at Alexandria, February 13, 1864.<sup>5</sup> Very few counties were represented,<sup>6</sup> but a constitution<sup>7</sup> was adopted. This was never submitted to the people for ratification.<sup>8</sup>

This Alexandria Constitution was never considered as the constitution of the State, although President Johnson by his proclamation recognized the Alexandria Government as the legal government of the State, and Peirpont as Governor.<sup>9</sup> This Government at the close of the civil war was moved to Richmond. Over this was the military commander, Gen. J. M. Schofield, and by his appointment Peirpont was superseded, April 6, 1868, by H. H. Wells.<sup>10</sup>

By two acts of Congress (one of March 2 and the other of March 27, 1867) the Federal Government provided for the reorganization of the State Governments.<sup>11</sup> The commander in each military district was instructed to take, before September 1, 1867, a registration of all persons entitled to vote.

<sup>1</sup> *Code of Va.* (1873), p. 14. Under the constitution of U. S. it was necessary that the Legislature of Virginia should consent to the new State (U. S. Const., Art. IV, Sect. 3, cl. 1.); hence we see one-third of the State claiming to be the State.

<sup>2</sup> *Code of Va.* (1873), p. 15. An act for the admission of West Virginia as a State had passed Congress, Dec. 31, 1862.

<sup>3</sup> *Code of Va.* (1873), p. 18.

<sup>4</sup> *Acts* (Alexandria), 1863-64, p. 4.

<sup>5</sup> *Code of Va.* (1873), p. 18.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Constitution in Acts* (Alexandria), 1865-67, p. 757, *et seq.*

<sup>8</sup> *Code of Va.* (1873), p. 18.

<sup>9</sup> *Ibid.*, p. 23.

<sup>10</sup> *Ibid.*, p. 25.

<sup>11</sup> See *Acts in Documents of Convention*, 1867-68, p. 8, *et seq.*



But all persons who had held any military or civil office (no matter how insignificant) under the United States or any State and had taken the oath of allegiance to the United States, and afterwards had in any way aided the "rebellion," were disfranchised. An election should then be held to take the sense of the registered voters for calling a constitutional convention and to elect delegates to the same. The basis of representation for the convention was to be the registered voters.<sup>1</sup>

The provisions of these acts were carried out in Virginia by General Schofield, and October 22, 1867, was appointed as the day for the election of delegates and for taking the sense of the qualified voters on a convention.<sup>2</sup> Schofield apportioned the one hundred and five delegates of which the convention under the acts of Congress was to be composed. He was accused of gerrymandering, but for this accusation there seems to be no grounds.<sup>3</sup>

The vote of the people declared in favor of the convention. The contest was between the races, the whites against the convention, and the blacks almost unanimously for it.<sup>4</sup>

The Convention assembled in Richmond, December 3, 1867, and remained in session till April 17, 1868. It was composed of eighty-one whites and twenty-four negroes.<sup>5</sup> According to parties there were sixty-eight "Radicals" or Republicans, and thirty-seven Conservatives or Democrats. Thirty-three members were non-natives of the State, persons who had come to

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<sup>1</sup>This basis did great injustice to the whites, as so many had been disfranchised. All the negroes, however, over 21 years of age had the right to register; hence taking the registered voters as the basis for the convention was a measure favorable to the blacks and much disliked by the whites.

<sup>2</sup>*Documents of Convention* (1867-67), p. 15.      <sup>3</sup>*Dispatch*, Oct. 31, 1867.

<sup>4</sup>The numbers of registered voters were 225,933; whites, 120,101, and colored, 105,832. At the election on the convention, 76,084 whites and 93,145 negroes voted. The vote for the convention was 107,342, of which only 14,835 were whites, and against the convention was 61,887, of which only 638 were negroes. See *Documents of Convention* (1867-68), pp. 52, 56.

<sup>5</sup>*Dispatch*, April 20, 1868.

Virginia from the North immediately after the civil war.<sup>1</sup> The "Radical" party of sixty-eight contained only fourteen white Virginians. Putting it another way, fifty-four<sup>2</sup> out of the one hundred and five members of the Convention, were the incomers from the North and the negroes.<sup>3</sup> The Convention was thus controlled by an element entirely opposed to the interests of the best people of the State, and they (the whites) were very violent in their denunciations of the Convention<sup>4</sup> and its President, Judge J. C. Underwood, who was thoroughly hated by the Virginia people.

In this Convention the question of a basis of representation had assumed a different aspect. There was no longer any Western Virginia to fear, no slave property to protect by keeping the government in the hands of Eastern Virginia; but it now became a question of white or negro domination in the State, whether the whites or the negroes should control the General Assembly. Some had no fears provided all the whites were given the right of suffrage, and then it became simply a question of party rule. The native Virginians, those who had fought for what they considered their rights, were apprehensive lest the Northern incomers with a few native whites by means of the negro vote would rule the State. In short,

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<sup>1</sup>*Dispatch*, April 10, 1868.

<sup>2</sup>At first sight one would think that, since there were 33 Northern incomers and 24 negroes, this element would be 57 instead of 54; but the facts in the case are that there were 30 non-native whites, 3 non-native negroes, and 21 native-born negroes.

<sup>3</sup>The Republican leaders were Underwood, Hunnicutt, Hawxhurst and Allan. The negro leaders were Lewis Lindsay and Dr. Sam Bayne. The speeches of the negroes are amusing and the English rich. They were a great source of annoyance to the white Republicans and of amusement to the Democrats or Conservatives. Dr. Bayne was so irrepressible that on one occasion a motion was made not to allow him to speak more than five times a day on one subject. (*Dispatch*, March 25, 1868.) On another occasion, J. C. Gibson, a Conservative, who was occupying the Chair in the Committee of the Whole, called Dr. Bayne to the Chair, much to the discomfort of the Republicans. (*Dispatch*, April 2, 1868.)

<sup>4</sup>*Dispatch* (Dec. 3, 1867) called the Convention a farce.

the question was whether the Democratic party, composed of the great mass of whites, or the Republican party (then termed Radical), composed chiefly of negroes and Northern incomers, should govern the State.

The Convention referred the question of a basis of representation and the apportionment to a special committee. Two reports were made, a majority and a minority report.<sup>1</sup> Neither report proposed a fixed basis to be embodied in the constitution, but differed in the number of members for each house and the way in which they should be apportioned.

The majority report, which was the Republican plan, proposed a House of Delegates of one hundred and thirty-eight, and a Senate of forty-two elected from thirty-nine senatorial districts. The minority report (the Democratic plan) favored a House of Delegates of eighty-four and a Senate of twenty-five. The majority report made the apportionment on the voters registered under the Reconstruction Acts of 1867, while the minority report took the census of 1860. The majority report was adopted by the Convention with some changes, so it alone will be discussed here. The Senate was apportioned at the ratio of one senator for every 5,400 voters. The House of Delegates was apportioned in a more peculiar fashion, to be a "compromise between population and counties." To quote the report: "The method adopted in allotting the members of the House of Delegates was to give one delegate to every 1800 voters, and, where the fraction over in a county exceeded nine hundred voters, to give another delegate, and to every county in which the number of voters was between nine and eighteen hundred, a delegate each. After making this allotment, it was found that nine counties, having less than nine hundred, were so situated that they could not be formed into suitable districts, and it was thought best to give each a delegate." The apportionment made by the Committee according to this

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<sup>1</sup> Reports in *Documents of Convention* (1867-68), pp. 270-275.

scheme was highly favorable to the Republicans, but, as modified and adopted by the Convention, was still more so.

The apportionment was a gerrymander in the following instances :

(1). There were fifteen counties with less than 900 voters. Of these nine were certainly Democratic. The others had such a large colored vote that it was probable that they would be Republican. The apportionment was so made that the *six* Republican counties would elect *six* delegates, while the *nine* Democratic counties would elect only *six*.<sup>1</sup>

(2). The Republicans were benefited by making the House of Delegates so large that the small counties could have one delegate each. Mr. Hawxhurst, Chairman of the Committee on Representation, admitted in a speech that the House of Delegates was made large for that purpose, as most of the small counties with less than 1800 voters were Republican.<sup>2</sup>

(3). The Committee on Representation reported two delegates for Henrico County, and six for Richmond City. But a new registration in Richmond was completed just before the Convention had finished its labors, and it was seen that the

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<sup>1</sup>The counties were King George, Lancaster, Middlesex, New Kent, Warwick, James City, Bland, Greene, Warren, Highland, Bath, Alleghany, Craig, Buchanan and Wise. The first six were Republican. Of course this was calculated on the basis of the registered voters of 1867, and on the expectation that many of the whites would be disfranchised. But when President Grant allowed the people to vote separately on the disfranchising clause of the constitution, and it was rejected, some of these became Democratic. Bland, Greene and Warren, Democratic counties, were given a delegate each. Bath and Highland, Buchanan and Wise, Craig and Alleghany, were made districts to elect three delegates. Cf. List of counties with number of registered voters (white and colored), *Documents of Convention*, 1867-68, p. 52; Report of Committee on Representation, *Documents*, p. 271, and Constitution, *Code of Va.* (1873), p. 76. Warwick was afterwards put into a district with Elizabeth City, but they were given two delegates, and, since Elizabeth City had a colored majority of 1,224, it only made Republican success surer.

<sup>2</sup>See Hawxhurst's Remarks in the Convention, *Dispatch*, March 25, 1868; and *Documents*, p. 51.



whites would probably be able to control the city ; and, since the colored voters in Henrico had a majority of 650, the two were made into one district and given eight delegates.<sup>1</sup>

(4). The Committee on Representation reported in favor of one senator from Henrico, and two from Richmond ; but, when these two were made into one district to elect delegates, they were also put into one senatorial district to elect three senators, thus giving the control of all the representatives for Richmond to the colored voters of Henrico.<sup>2</sup>

(5). The Committee on Representation reported two delegates for Chesterfield and one for Powhatan. Chesterfield was a doubtful county ; but Powhatan was largely Republican, the colored voters having a majority of 722. The Convention made these two counties into one district, electing three delegates.<sup>3</sup>

With representation thus apportioned,<sup>4</sup> and without any basis for future apportionments,<sup>5</sup> the constitution was adopted by the Convention. The whole system of representation was entirely unfavorable to the whites. The result was that the citizens of Virginia were urged to do their best to reject the

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<sup>1</sup> Registered voters in Richmond in 1867 were, whites, 5,571 ; negroes, 6,284 ; in 1868, whites, 6,571 ; negroes, 6,607. Cf. *Documents*, pp. 52, 271 ; *Code of Va.* (1873), p. 76, and *Dispatch*, March 16, April 3, 4, 20, 1868.

<sup>2</sup> Cf. *Documents*, p. 51, 52, 271 ; *Code of Va.* (1873), p. 78 ; *Dispatch*, March 16, April 3, 4, 20, 1868.

<sup>3</sup> Cf. *Documents*, p. 51, 52, 271 ; *Code of Va.* (1873), p. 76.

The accusation was also brought that taking the registration of 1867, by which so many whites were disfranchised, instead of the census of 1860 was to give larger representation to the counties having a large colored population. (*Dispatch*, March 23, 1868.)

<sup>4</sup> The Convention made one change in the report of the committee in regard to the Senate. Instead of 39 districts and 42 senators, the number of districts was made 40, and senators, 43. See Constitution: *Code of Va.* (1873), pp. 78, 79.

<sup>5</sup> The constitution provided that reapportionments should be made by the first sessions of the General Assembly after every census, but did not state that the population must be the basis of the reapportionments. (Constitution: *Code of Va.*, 1873, p. 79.)

constitution,<sup>1</sup> and it is probable that a large vote would have been polled against the constitution had it been immediately submitted to the people. However, by a proclamation of General Schofield, it was announced that no elections would be held, as Congress had made no appropriations to defray the expenses.<sup>2</sup> April 10, 1869, Congress passed an act to have the constitution submitted to the qualified voters.<sup>3</sup> The act provided that President Grant should designate the time for the elections, and might also set apart such clauses of the constitution as he saw fit, to be voted on separately. By far the most objectionable features of the constitution were the disfranchising clause<sup>4</sup> and the "ironclad" oath.<sup>5</sup> By Grant's proclamation<sup>6</sup> these two clauses were submitted separately to the voters, and rejected,<sup>7</sup> whereas the rest of the constitution was ratified by an almost unanimous vote, July 6, 1869.

The apportionment of representation as embodied in the constitution lasted only two years. In 1871, the General

<sup>1</sup> The Democratic members of the Convention issued an address pointing out the defects of the constitution (representation being one), and urged the whites to vote for rejection. (*Dispatch*, April 20, 1868.)

<sup>2</sup> *Dispatch*, April 5, 1868.

<sup>3</sup> *Code of Va.* (1873), p. 26.

<sup>4</sup> The disfranchising clause had been put into the constitution in order to keep the government, if possible, in the hands of the Northern incomers and negroes. Schofield went into the Convention in 1868, and tried to persuade it to remove this clause. He was hissed and called "King Schofield" by the Republicans and negroes. (*Dispatch*, April 18, 1868.) This clause disfranchised everyone who had been an officer, Federal, State or County, previous to or during the war and had afterwards aided in the "rebellion." See *Code of Va.* (1873), p. 26.

<sup>5</sup> Schofield had also opposed this. It provided that every officer hereafter elected should swear that he had never voluntarily borne arms against the United States. (*Code of Va.*, 1873, p. 28.) This was a Republican measure to keep the best out of office, as only negroes, Northern incomers, and a few others would be eligible.

<sup>6</sup> *Code of Va.* (1873), pp. 26-27.

<sup>7</sup> The vote on the disfranchising clause was 84,410 for, and 124,360 against, and on the "ironclad oath" 83,458 for, and 124,715 against; for the rest of the constitution the vote for ratification was 210,285, and for rejection, 9,136.

Assembly made a reapportionment.<sup>1</sup> The House of Delegates was reduced from one hundred and thirty-eight to one hundred and thirty-two. The number of the Senate, forty-three, remained unchanged.<sup>2</sup> The gerrymander of the constitution was broken up. Richmond and Henrico were separated for the election of delegates, Richmond being given five and Henrico two, but they continued to form a senatorial district electing three senators. Chesterfield and Powhatan counties were no longer to be one district for the election of delegates, but Chesterfield was to elect two and Powhatan one delegate. The districts of Alleghany and Craig, of Highland and Bath, and of Buchanan and Wise, each electing one delegate remained unchanged, but Charles City and New Kent, and York and James City were made districts electing one delegate each, while the district of Warwick and Elizabeth City was reduced from two delegates to one.<sup>3</sup>

The constitution provided for annual sessions of the General Assembly, although the delegates were elected biennially, and the senators for four years, half of the districts electing every two years.<sup>4</sup> In 1875, an amendment to the constitution was suggested by the General Assembly, reapproved by the same

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<sup>1</sup> See *Code of Va.* (1873), pp. 79, 135. The plan of this reapportionment was to give as near as possible one delegate to every 12,000 persons, and one senator to every 36,000. (*Dispatch*, Jan. 31, 1871.)

<sup>2</sup> The power resided in the General Assembly to change the numbers since the constitution gave the right to reapportion, and did not definitely fix the number for each House. See *Constitution: Code of Va.* (1873), pp. 75, 79.

<sup>3</sup> Cf. Apportionments in *Code of Va.* (1873), pp. 76-79, and 134-137. The other changes were one delegate less to Pittsylvania, and to Norfolk County and Portsmouth. In the Senate the districts were differently arranged and numbered. Under the constitution the plan was that all the senatorial districts bearing odd numbers should elect at one time, and all with even numbers at another. By the reapportionment they were so arranged that all districts numbered from one to twenty inclusive should elect at one time, and all from twenty-one to forty inclusive at another. *Code of Va.* (1873), p. 137.

<sup>4</sup> *Constitution: Code* (1873), pp. 75, 78, 80.

body in 1876, and then ratified by the vote of the people.<sup>1</sup> By this amendment the General Assembly was to meet biennially, unless specially called by the Governor.

The members of the General Assembly were to be elected as previously. The House of Delegates was to be composed of not more than one hundred nor less than ninety, and the Senate of not more than forty nor less than thirty-three. Another reapportionment was to be made at some time previous to 1879 and again in 1891, and every ten years thereafter.

February 17, 1878, the General Assembly, in accordance with this provision, reapportioned representation throughout the State, giving one hundred delegates to the House and dividing the State into thirty-nine senatorial districts, each electing one senator except the thirty-fifth district, composed of Richmond and Henrico, which was to elect two senators.<sup>2</sup> When this apportionment was made, the population was largely guesswork, so the principle used was somewhat of a reversion to the old county system of representation. The plan was that "representation should, when it was possible, be given to small counties even at the expense of the larger, so that every distinct community within limits should have its voice heard in the Legislature."<sup>3</sup> An attempt was made to revert almost entirely to the old county system. A bill was introduced to give four delegates to Richmond, and to take delegates from all counties and cities having more than one, and so to distribute them as to give all the small counties, with a few exceptions, one delegate each. This was defeated, as it gave too much power to the minority, it being estimated that

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<sup>1</sup>*Acts of Assembly* (1874-75), pp. 399-403, and *Acts* (1875-76), pp. 82-93. For this method of amending the constitution, see *Constitution: Code* (1873), p. 100.

<sup>2</sup>*Acts of Assembly* (1877-78), pp. 111-114.

<sup>3</sup>Report of Committee: *Dispatch*, Feb. 18, 1878. The committee said that, as far as practicable, they desired to get back to the principles of the Constitution of 1776.



one-third of the population would elect at least one-half of the delegates.<sup>1</sup>

In 1891, another reapportionment was made. The number of members for both houses remained the same, but the districts were differently arranged in order to meet the rapid increase in population in some sections of the State.<sup>2</sup> The basis taken in allotting representation was the population according to the census of 1890; one senator for every 40,000 persons, and one delegate for every 16,000, but this was considerably modified by county limits.<sup>3</sup>

A glance at the history of representation in Virginia shows that, as much as the *basis question* has been agitated, there has never been a basis of representation except in the Constitution of 1776, which made the basis for the House of Delegates two from each county, while no basis was adopted for the Senate. The present constitution provides for reapportionments after every census, but does not state that the population is to be the basis. The whole power is in the hands of the Legislature, and thus opportunities are afforded for fraud. Any political party in power at the time of a reapportionment has the power to adopt any basis for that reapportionment, and to gerrymander the State for party aggrandizement.<sup>4</sup>

Although the basis question in Virginia has lost its interest since the civil war and the abolition of slavery, yet it seems best that every constitution should embody some basis of representation. To some, population as a basis seems so generally recognized, that a constitutional basis appears useless. By no means is population the general basis for State legislatures. In the whole of the New England, there is not a State in which the present system of representation is based entirely on popu-

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<sup>1</sup>*Dispatch*, Feb. 19, 1878.

<sup>2</sup>See *Acts of Assembly* (1891-93), pp. 56-60.

<sup>3</sup>*The Times*, Dec. 11, 1891.

<sup>4</sup>That the Democrats had such an idea in 1891 is shown by the remarks of some of the Democratic leaders in the halls of the Legislature at the time of the reapportionment. See *Dispatch*, Dec. 20, 1891, and *Times*, Dec. 20, 22, 23, 1891.

lation. The large towns in some instances have no greater number of representatives than the small ones, while, in other instances, a maximum number of representatives is established, and it matters not how large the population of any town may be, this maximum cannot be exceeded.<sup>1</sup> In Maryland, Baltimore is not represented in proportion to its population.

In Virginia, some improvement might be made in regard to the election districts for both the Senate and the House of Delegates. It often occurs that the larger county or counties in the districts secure all the representatives to the detriment of the smaller counties. In county relationship the minority should be recognized as well as the majority, and, therefore, some form of proportional representation between the counties in election districts should be adopted. The principle of rotation between counties in the same district, as seen in the West Virginia constitution, is good.<sup>2</sup> In Massachusetts a well established custom determines that there shall be "rotation within the district so that each town shall have its turn in sending as representative one of its own residents once in every few years."<sup>3</sup> Each county in Virginia, with a few exceptions, has its own peculiar interests, and it is nothing but just and proper that each should have a constitutional right to send to the General Assembly, at stated periods, a representative from its own limits.

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<sup>1</sup> G. H. Haynes: Representation in the New England Legislatures, *Annals of Am. Academy*; Sept., 1895.

<sup>2</sup> *Supra*, p. 72; Note 4.

<sup>3</sup> G. H. Haynes: *Annals of Am. Academy*; Sept., 1895.



VIII

# HISTORY OF TAXATION IN CONNECTICUT

1636-1776





JOHNS HOPKINS UNIVERSITY STUDIES  
IN  
HISTORICAL AND POLITICAL SCIENCE

HERBERT B. ADAMS, Editor

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History is past Politics and Politics are present History.—*Freeman*

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FOURTEENTH SERIES

VIII

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BY FREDERICK ROBERTSON JONES, A. M.

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# CONTENTS.

## CHAPTER I. INTRODUCTION.

## CHAPTER II. BASIS OF TAXATION.

PAGE

Land Tax . . . . .	15
Property Tax . . . . .	20
Poll Tax . . . . .	23
“Faculty” and Income Taxes . . . . .	25

## CHAPTER III. THE GRAND LIST.

Code of 1650 . . . . .	28
Officers: Powers; Duties . . . . .	30

## CHAPTER IV. RATES.

Power to levy . . . . .	37
Form . . . . .	39
Reduplication . . . . .	41
Exemptions . . . . .	42
Bills of Credit . . . . .	43

## CHAPTER V. COLLECTION OF TAXES.

The Constable . . . . .	46
Abatement—Discount . . . . .	51

## CHAPTER VI. INDIRECT TAXATION.

Excises . . . . .	53
Imposts . . . . .	56
Tonnage Duties . . . . .	59

## CHAPTER VII. LOCAL TAXATION.

Ecclesiastical Tax . . . . .	60
Educational Tax . . . . .	64
Other Taxes . . . . .	67
Machinery . . . . .	68

## APPENDIX. TABLE OF GRAND LISTS.





# HISTORY OF TAXATION IN CONNECTICUT.<sup>1</sup>

1636-1776.

## CHAPTER I.

### INTRODUCTION.

The colonial history of Connecticut, whether considered from a religious, political or financial standpoint, is the portrayal of a steady and uniform growth. With regard to the financial history, this is especially true; but were the entire history of the commonwealth under consideration it would present four well defined periods:

I. *The Colonial Period*, 1636-1776. Distinguished by the simplicity of its system,—a rural people with colonial and archaic institutions.

II. *The Period of Industrial Growth*, 1776-1818. Matters relating to taxation became more complex in consequence of the growing industrial system, while the colonial system was continued.

III. *The Period of Radical Change*, 1818-1850. By the adoption of the constitution of 1818, property was taxed according to its selling value, and not, as formerly, according to its probable income.

IV. *The Modern Period*. Beginning with 1850, all property, unless especially exempted, was taxed and made ratable at three per cent. of its true value.<sup>2</sup>

It is the design ultimately to consider the financial history of the commonwealth throughout these periods, but

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<sup>1</sup> Acknowledgments are due Prof. C. M. Andrews, of Bryn Mawr College, and Mr. C. E. Burnap and Miss Mary Graham Jones, of Hartford, for valuable assistance in the preparation of this monograph.

<sup>2</sup> Ely, "Taxation in American Cities and States," 134.

the history of taxation during the first or colonial period demands our immediate attention. From the time of the settlement of the three towns upon the river to the beginning of the Revolutionary War, a period of a hundred and forty years, there is not a break that would warrant a division of the history of taxation into periods. It is a continuous growth, though with periodic rings that mark well the change from the simplest possible system to that of a somewhat more complicated one. For this reason it has been found advisable to trace the history of the different elements in taxation without interruption to the end of the period, thus preserving the essential unity of the whole period and at the same time treating the topic in its completeness. The only exception to this rule is a short sketch of the earliest years of taxation, before any signs of a system appeared.

The two natural divisions of the history of taxation in Connecticut are, central or commonwealth taxation, and local, or, what is practically the same, town taxation; the other forms of local taxation, county and proprietorship, having been of minor importance. Commonwealth taxation is concerned with direct and indirect taxation,<sup>1</sup> while town taxation is treated in accordance with the three objects for which it was laid, viz: the general expenses incident to town government, ecclesiastical and educational expenses. Direct taxation was the backbone of the colonial system of taxation, the first and always the principal source of the commonwealth revenue. It was levied at first upon land, property and polls, and later upon "faculties"<sup>2</sup> and incomes. Land constituted a primary basis of taxation. It was taxed, not according to its selling value, but according to fixed rates for each kind, prescribed by statute, which were thought to represent the average

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<sup>1</sup> "Taxes consist in the articles of rates, impost and excise." Douglass, "Summary of America," II., 177.

<sup>2</sup> A word used in colonial New England, meaning trades or professions.

income it would produce. Different kinds of property were listed at fixed sums, determined by law, and polls placed in the same list at a lump sum. Faculty was rated according to gains, and, as a later development, direct taxes placed upon incomes. All, however, was more or less determined by statute, and beyond the control of the listers, who made up the different assessments into a grand total called the Grand List, upon which taxes were levied in the form of a certain per cent., as "1d on the pound." The chief official in collecting the tax was the constable. Indirect taxation formed a very unimportant source of the public revenue. It developed late, and was introduced to lighten the burdens of the direct tax. As an excise it took the form of a payment for license to sell and a tax on products; while as an impost duty it was levied on exports and imports. Local taxation was confined to direct taxation and furnished the revenue for the support of the church, the school and the town. There were several other minor sources of public revenue, as for instance fines, fees, sale and rent of lands, land-banks and lotteries, which are interesting and would be treated in a financial history of the period, but in the scope of the present study they have no logical position.

The genesis of taxation in Connecticut shows a conscious effort on the part of the colonists to conform to the institutional model furnished by the mother colony. The seceding Massachusetts towns transplanted to Connecticut the financial system to which they had been accustomed in England and Massachusetts. Accordingly, as in Massachusetts,<sup>1</sup> we find that as the public revenue increased, those forms of taxation with which the colonists had already become familiar in England were gradually introduced—for example, the general property tax, taxes on certain specified classes of products, the tax on polls, imports, excise and the income tax, which with various modifications and additions continued to be the backbone of the system

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<sup>1</sup> Douglas, "The Financial History of Massachusetts."



of taxation even down to 1818. The Massachusetts system of taxation was undoubtedly transferred to Connecticut and formed the foundation upon which the financial structure of the colony was built.<sup>1</sup> However, as we shall

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<sup>1</sup> This fact is best shown by a comparative study of the several codes of laws of the two colonies: the Massachusetts codes of 1649 and 1660, the Connecticut code of 1650, the New Haven code of 1656 and the Andros code of 1687. Each of these codes embraced the laws regarding taxation. The Massachusetts code of 1649 is not extant; consequently the following argument is necessitated.

1. The New Haven code of 1656 was largely a copy of the Massachusetts code of 1649. The New Haven committee appointed March, 1648, to draw up a system of taxation reported, October 15, 1649, that "the law for carying one publique rates in ye Massachusetts, wch is now in print, was read & considered, (wch was now also read in court,) and the comitee therin also advising wth the elders thought the way just and that it might suit vs and be followed here," etc. (New Haven Col. Rec., I., 494.) A disagreement as to the method of rating property was then noted, and the matter put into the hands of the Court to decide. The Court debated the report of the committee, and finally decided "that the order of ye Massachusetts for publique rats should be an order heare in this towne, except in case of houses and household goods," etc. (*ibid.*, 495.) This law was embodied in the code adopted in 1656, and in the title of these "Laws" we find decisive proof: "Certaine Lawes, Liberties and Orders made granted and established, at severale termes of the Generale Court of New Haven Colony, for and to the Inhabitants of that Jurisdiction, now collected, and further Published, for the use of such are concerned in them wherein they have made use of the Lawes published by the Honourable Colony of the Massachusetts" (*ibid.*, II., 571). See also the request made to Governor Eaton, May, 1655 (*ibid.*, 147). The title "Rates" in the code of Connecticut, and the title "Charges" in the code of New Haven, contain the laws relating to taxation in both of these colonies. These laws agree in most instances word for word, and a comparison will convince one that they are either copies of each other or are taken from a common source. The New Haven code was adopted after the Connecticut code, and acknowledged to have been taken from the Massachusetts code of 1649. Was not this Massachusetts code that common source? (F. C. Gray, *Mass. Hist. Soc. Coll.*, 3 S., VIII., 191).

2. The Connecticut code of 1650 and the New Haven code of 1656 are very similar to the Massachusetts code of 1660, the latter being under the same alphabetical heads and the laws generally

discover, the two structures reared upon that foundation by these two colonies, differed materially—the fundamental principles borrowed from England, were in Connecticut, “twice purged.”

The year 1639 is a most important date from a financial as well as from a constitutional point of view, for in the two compacts promulgated in that year are found the germs of a system of taxation. On the 14th of January, 1639, all of the freemen of the three towns upon the river met at Hartford and adopted the “Eleven Fundamental Orders.”<sup>1</sup> Prior to the 4th of June, 1639, the colony of New Haven lived under a simple compact to be governed according to the rules laid down by the Scriptures. On that date all of the free planters assembled in a general meeting to consult about “settling civill gouernmt according to God.” A compact was drawn up and signed by the voting freemen.<sup>2</sup> The eleventh of the Fundamental Orders states that when any General Court upon the necessities of the

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in the same words. Now this Massachusetts code of 1660 is an amended form of that of 1649, and where it differs from those of Connecticut and New Haven, it differs from the laws of Massachusetts existing in 1649. This difference is due to the natural growth of the eleven years as embodied in the amended code of 1660.

3. When Andros came into power in 1686, an act was passed regulating taxation; it was nothing more nor less than the old Massachusetts laws of 1649 re-enacted (“Andros Tracts,” II., 210; John Palmer, *ibid.*, I., 80). This law of Andros and that of 1650 of Connecticut agree in all their principles of taxation, and in many instances read *verbatim*. Cf. Palfrey, “History of New England,” III., 520.

The probability that the Connecticut settlers would adopt the customs of the mother colony, the well-known tendency of Connecticut to follow the “Bay Horse” in other legislation, and the fact that the union of New Haven with Connecticut in 1665 made practically no change in the system of taxation in the former, all tend to strengthen the argument just adduced. Cf. Palfrey, “History of New England,” III., 57, 60-2; 3 Mass. Hist. Soc. Coll., VIII., 214; Windsor, “Narrative and Critical History,” III., 371, note 2; 373, note; Chalmers, “Political Annals,” I., 292.

<sup>1</sup> Conn. Col. Rec., I., 20-5.

<sup>2</sup> New Haven Col. Rec., I., 12.

commonwealth agreed upon any sum of money to be levied upon the several towns within the jurisdiction, a committee was to be appointed to determine what proportion of the tax each town should pay—the committee to be made up of an equal number from each town.<sup>1</sup> The “Freemans Charge,” a necessary preliminary to admittance to the New Haven compact, made it a duty for the freeman to promote the welfare of the jurisdiction according to his ability in both person and estate.<sup>2</sup>

On account of the stupidity or willfulness of Governor Vane and his Council, the feeble colony upon the Connecticut was brought into a life-or-death conflict with the Pequots, the most powerful Indians of Connecticut. The first day of May, 1637, the General Court, now first so called, assembled at Hartford and declared “an offensive warr agt the Pequott.”<sup>3</sup> This war, though happily terminated in favor of the colonists, left distress upon all the people. Scarcity and debt was the condition. Notwithstanding this low state of the colony, it was necessary that a tax of £620 be collected immediately to defray the expenses of the war. This is probably the first public tax in Connecticut.<sup>4</sup> The system of collecting this tax was

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<sup>1</sup> Conn. Col. Rec., I., 25; Trumbull, “History of Connecticut,” I., 102; Hollister, “History of Connecticut,” I., 87.

<sup>2</sup> New Haven Col. Rec., I., 19.

<sup>3</sup> The first “charge” of any kind that we find mentioned was the levy in kind to provide for this war. The towns were to furnish a certain amount of armor for the equipment of the soldiers; also biscuit, meal, suet, butter, the “good beare for the Captain” and the “3 or 4 gallons of strong water,” and all kinds of food necessary for the maintenance of the soldiers. In the levy of corn, that product being a medium of exchange, the apportionment as between the towns was rigidly observed. Hartford furnished 42 men and 84 bushels of corn; Windsor, 30 men and 60 bushels of corn; and Wethersfield, 18 men and 36 bushels of corn. The same rule was observed in the second levy. Conn. Col. Rec., I., 9-10.

<sup>4</sup> It was assessed upon the towns as follows: £86 16s upon Agawam (Springfield, then considered to be in the Connecticut jurisdiction), £158 2s upon Windsor, £251 2s upon Hartford and

simple. Mr. Clement Chaplin was appointed treasurer. He directed his warrants to under-collectors who collected the rate, and after having defrayed the bills of the plantations by order of the treasurer, they returned the balance to the same official. In New Haven, the investments in the Joint-stock Association of Adventurers formed the basis of the first taxes. The first rate that we have mention of, is one made November 25, 1639, of twenty-five shillings upon every hundred pounds.<sup>1</sup> There was but one more tax of this kind before January 4, 1639,<sup>2</sup> when divisions

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£124 upon Wethersfield. Payment could be made either "in monney, in Wampum at fower a penny, or in good and marchantable beaver at 9s p<sup>r</sup> pounce" (Conn. Col. Rec., I., 12). The collectors were slow in collecting the rate, for at the April session, 1638, a warrant was directed to the collectors of the towns, requiring them to make returns to the treasurer within twenty-five days or be held for contempt (*ibid.*, 17). The amount ordered to be paid by the towns for certain services, November 1, 1636, can scarcely be called a public tax (*ibid.*, 6). Mr. Trumbull, in his "History of Connecticut," does not mention it. J. W. Barber (Connecticut Historical Collections, 13) incorrectly states the first tax to have been one of £550. As Trumbull ("History of Connecticut," I., 95) makes this same mistake, it is evident that Barber copied the error. Hollister ("History of Connecticut," I., 91) does not make the error.

<sup>1</sup> Of the purpose for which it was levied we are not informed by the town records. New Haven Col. Rec., I., 12.

<sup>2</sup> This tax was one of 30s on every hundred pounds, to defray the cost of building a meeting-house. It brought in £500, the cost of the church, which shows a taxable amount of about £33,333⅓. It was to be paid in three installments; the first immediately, the second by the following March, and the third by the next May (New Haven Col. Rec., I., 25); Dr. Levermore, ("The Republic of New Haven," J. H. U. Studies, extra volume I., 76), undoubtedly confounds these two taxes. He says: "Of the earliest recorded tax nothing is known beyond the assertion that it was at the rate of 25s upon every hundred pounds, in order to defray the cost of the first meeting-house. The sum raised was £500, which shows a taxable amount of about £40,000." A glance at the New Haven Colonial Records, I., 25, will show the error. The 25s per hundred pounds was an earlier tax, and had nothing to do with the construction of the meeting-house, so far as we are able to find, for the tax of 30s per hundred pounds is made coincident with the order that a meeting-house be built, that is, November 25, 1639. Henry White (New Haven Hist. Soc. Papers, I., 34) probably falls into the same error.



of land were made and taxes thereafter were laid upon "real estate and not upon pounds sterling."<sup>1</sup>

Thus were the first principles of taxation transferred from the mother colony and early established in Connecticut. But as the wants of the colony became greater, other principles were from time to time introduced from the same source in order to meet these increased demands, until May, 1650, when they were all incorporated into the Code of Laws, from which date Connecticut may be said to have had a system of taxation.<sup>2</sup>

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<sup>1</sup> Levermore, "The Republic of New Haven," 77; New Haven Col. Rec., I., 26-7.

<sup>2</sup> Conn. Col. Rec., I., 548. In the New Haven colony the codification of the laws did not take place until six years later, 1656. (New Haven Col. Rec., II., 581.)

## CHAPTER II.

### BASIS OF TAXATION.

The duty of every citizen to contribute his share in the support of the colonial government was very clearly set forth in the Code of Laws. It declared that every inhabitant should contribute to all charges, both civil and ecclesiastical, and that every person who did not voluntarily contribute proportionally to his ability with the rest of the same town, should be compelled to do so by assessment and distraint. Furthermore, that the lands and estates of all men should be rated for all town charges where the lands and estates lay and where the persons dwelt.<sup>1</sup> This duty of every inhabitant to contribute towards the support of the colony was based upon the theory of benefit received by reason of the existence of the government. The amount of the contribution was determined by the ability of the inhabitant to pay, and his ability, by the amount of land and property he possessed, while every able-bodied freeman was required to pay a specified sum as a poll tax. Later, taxes were laid upon "faculties," and sometimes upon special classes of people. These bases of taxation will therefore be considered individually from their first appearance as a factor in taxation to the end of the period under consideration.

#### *Land Tax.*

In Connecticut, as in any system of taxation, land formed the primary basis. The first mention of it as a basis of taxation is January 4, 1638,<sup>2</sup> and August 5, 1640, in New Haven.<sup>3</sup> The former is especially noteworthy from the

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<sup>1</sup> Conn. Col. Rec., I., 547-8.

<sup>2</sup> Conn. Col. Rec., I., 53.

<sup>3</sup> New Haven Col. Rec., I., 39. September, 1640, a rate of £200 was laid, "halfe upō estates and halfe upon lands."

fact that it introduced the principle by which land was rated during the entire colonial period, in fact down to 1818; this was the practice of rating land not according to its selling value but upon its probable net revenue—the “prfitte & benefitts thence arising.”<sup>1</sup> It was, however, in New Haven that the estimates of the probable revenue of land were first prescribed by statute as fixed rates for each kind, for, October 23, 1640, an annual tax was placed upon land according to the quality.<sup>2</sup>

The Connecticut Code of Laws, May, 1650, brought matters relating to taxation of land into a more definite shape; all sorts of land, whether tilled or not, were taxed, with but few exceptions,<sup>3</sup> for country and town charges.

<sup>1</sup> “In our American colonies, in assessing of rates, real estate is generally valued at seven years’ income, which is favorable. In Great Britain lands are sold at twenty or thirty years’ purchase.” (Douglass, “Summary of America,” II., 178.) The report of the Special Tax Commission of Connecticut (January, 1887, pp. 9-10) is very clear upon this point: “Lands, as distinguished from buildings, were put in the list at a fixed rate for each kind prescribed by statute; not because those sums were deemed to be the value of the lands, but because they were thought to represent the average income they would produce.” It is necessary to grasp this fact in order to understand why later, after the introduction of the principle of the Grand List, lands are rated at such low figures.

<sup>2</sup> 1. Land of the first division, 4d an acre upon all upland and meadows. 2. Land of the second division, 2d an acre. (New Haven Col. Rec., I., 43, 91, 193.) Later, about July, 1643, this two-fold division was explained: land in the first division was upland within two miles of the town; it included “land in the Necke,” which was rated separately; land in the second division lay without the two-mile limit. *Ibid.*, 193.

<sup>3</sup> Other exemptions were made, but they were never numerous enough to impair the equality of the land tax. The following is the list during the entire colonial period:

1. Certain classes of land:

(a) Common land for free feed of cattle used by the inhabitants in general, whether belonging to towns or particular persons. (May 1650.) Conn. Col. Rec., I., 548.

(b) All estates of land in England. *Ibid.*

(c) Lands used for ecclesiastical, educational and charitable purposes. *Ibid.*, VIII., 133.

(d) To encourage clearing land, inclosed land was freed from rates for four years (October, 1676). *Ibid.*, II., 294; V., 473.

All estates, both real and personal, were rated at one penny for every twenty shillings,<sup>1</sup> and land in New Haven at twenty shillings an acre.<sup>2</sup>

The system of taxation was not affected in the least by the acquirement of the charter from Charles II., in 1662, and the consequent union with the New Haven colony. The system of taxing land was practically the same. As more territory was opened up, and the difference between the grades of land under improvement became greater, a new classification of lands was sorely needed. There was much inequality in the land tax under the old, rather rough manner of rating, and a new classification of lands was urged. October 13, 1670, the matter was taken up for consideration, with the result that a committee of seven prominent men of the colony was appointed to make a classification of the lands of the colony according to a "just and equal apprizement," and to make a report to the General Court.<sup>3</sup> But the committee does not seem to have done anything, as it made no report, and there is no reference to

(e) Pasture land when plowed for another crop (October, 1737). *Ibid.*, VIII., 132.

2. Persons exempted from paying the land tax:

(a) Individuals at certain times for specific reasons. New Haven Col. Rec., I., 177; II., 581.

(b) Ministers of the Gospel were exempted from payment of rates on their land and other property, May, 1699. "The Governor, Councill and Representatives, in Generall Court assembled, from their peculiar regard unto, and for the encouragement of the severall ministers of the gospel that are called and settled in this Colonie, doe order and enact that their estates in the severall towns where they live shall be exempted from paying rates, and therefore not to be listed in the public and generall list." Conn. Col. Rec., IV., 287; Trumbull, "History of Connecticut," I., 400, 428.

<sup>1</sup> Conn. Col. Rec., I., 548. All "peculiar," viz., such lands as were not yet laid within the bounds of any town, were listed according to the rates of the town next to them (determined by the distance of the meeting-houses, *ibid.*, 550), or in which they lay (May, 1717, Conn. Col. Rec., VI., 6). Cf. Douglass, "Summary of America," II., 177.

<sup>2</sup> New Haven Col. Rec., II., 581, 583.

<sup>3</sup> Conn. Col. Rec., II., 137.



the matter until six years later. October 23, 1676, a committee previously appointed for the purpose, and composed of the same number as the old, but, with the exception of one, of entirely different men, submitted a full report putting an estimate upon all the lands in the colony according to which they were to be entered upon the Grand List. It was evidently entirely satisfactory, as it was adopted at once. The valuation of lands varied as their use, quality, locality and position.<sup>1</sup> The system was somewhat complicated, there being different rates for each town in the colony, in addition to the classification by quality, etc. This schedule was not affected in the least by the temporary discontinuation of charter government, October 31, 1687. Lands were still rated at an "equal and indifferent value according to their worth in the towns and places where they lie."<sup>2</sup> The system was somewhat modified, May, 1712, when an act was passed by which all valuations were changed, a simpler classification by locality, introduced, but by which the division according to kind and quality remained essentially the same. For the purpose of rating meadow lands the colony was divided into three sections, roughly corresponding to the middle Connecticut Valley, the shore lands, and

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<sup>1</sup> (a) Meadow lands were set in the list at from 55s to 20s per acre, and the best found in the town of Wethersfield.

(b) House or home lots were rated at from 55s to 15s per acre; those of Hartford and Wethersfield being rated at the former sum. (Cf. *ibid.*, IV., 490.)

(c) Tilled lands, according as to whether they were lowlands or uplands, were rated at 25s to 8s per acre. The uplands of Hartford, upon the south side, were the best.

(d) Mowing and pasture lands were rated at from 20s to 10s per acre, and

(e) All other lands at 1s per acre.

Differences of opinion arose as to the meaning of "home lots." October 11, 1722, the General Court explained "that every lot wherever any inhabitant dwells (having first been under improvement four years) shall be deemed a house lot, and the owner thereof listed accordingly." (Conn. Col. Rec., VI., 338.)

<sup>2</sup> *Ibid.*, III., 406.

the new and slightly improved lands of the west.<sup>1</sup> Meadow lands were assessed at different rates according to the section in which they were situated, and within that section according to their quality.<sup>2</sup> With this classification the colonial system of taxation, in so far as it affected land as a basis, became fully evolved. There was no further legislation that in any way affected the principles of the land tax.

<sup>1</sup> 1. Meadow lands in the county of Hartford.

2. Those in the counties of New Haven, New London and Fairfield.

3. Those in the towns of Danbury, Woodbury and Waterbury (October, 1737, this section was dropped. *Ibid.*, VIII., 132).

The rating of these lands differed considerably; later, other changes were made:

(a) House-lots of three acres at £3 a lot, and smaller ones proportionally; if more than three acres, the surplus was assessed as plow and pasture lands of the like kind. (October, 1714, *ibid.*, V., 473.) Cf. Douglass, "Summary of America," II., 177.

(b) Meadow lands: (1. Section). Plowing and mowing, 15s per acre; boggy meadows, if mowed, 5s per acre. (2. Section). Salt and fresh, 7s 6d an acre; boggy meadows, if mowed, 5s an acre. (3. Section). Mowing and plowing, 6s an acre; boggy meadows, if mowed, 4s an acre; all plow lands, 8s; all pasture lands, cleared, 8s; not cleared, but fenced, 12d.

(c) Other lands: (1) Plow lands, 10s per acre for every year improved. October, 1714, whether improved or not, if within fence ("except lands in common fields not improved," viz., only those lands which had been plowed. October, 1751, *ibid.*, X., 45), at 10s an acre, and those assessed at a higher rate to remain as before (*ibid.*, V., 473); May, 1715, assessed at 8s the year after the crop was taken off, as pasture land (*ibid.*, V., 502). (2) Pasture lands: same as plow lands; except those not cleared, which were 12d. May, 1715, assessed at 8s an acre, except that overgrown with brush, which was 2s (*ibid.*, V., 502; X., 45).

<sup>2</sup> Notwithstanding this act, certain towns would persist in entering their lands according to original grants or records, and not according to their true quantity within fence or improved; "whereby," as the act states, "the end of the law is not obtained nor the taxes equally laid on the inhabitants." To prevent further misunderstanding, it was explicitly stated, October, 1718, and restated October, 1720, that all ratable lands were to be entered in the list according to their real quantity within "fence or improvement." Conn. Col. Rec., VI., 76; VIII., 133.

*Property Tax.*

The public expenses were met by a revenue derived chiefly from direct taxes upon land and property; the latter was laid coincident with the former. The "Freemans Charge" of the town of New Haven mentions the duty of the citizen to pay to the public fund according to his "estate,"<sup>1</sup> while in Connecticut the first mention of a tax upon property was June, 1640.<sup>2</sup> In making up the lists of the town of New Haven, estates were classed apart from land; each citizen was required to render a true account of both.<sup>3</sup> The development of the property tax in this town is instructive, and as the result was the same as that in the Connecticut colony—the incorporation of the Massachusetts system—it is well worth our consideration. On account of the failure of the Delaware Company, those individuals who were rich in 1640, became impoverished, and possessing more land than their neighbors, who had accumulated personal property rather than real estate, the burdens of the land tax bore heavily upon them. It soon became evident that this inequality of taxation ought to be adjusted, so in the town court of March, 1648, it was moved that the court consider some other way of rating men than by lands. Others concurring, a committee was appointed to consider the matter. This committee studied the system of taxation then existing in Massachusetts, and October 15, 1649, reported that after having considered the laws in Massachusetts and other places, it advised the adoption of the Massachusetts system, but whether or not houses and household goods should be rated as in that system they were unable to decide and left it to the court's consideration. There was a prolonged debate over this

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<sup>1</sup> September, 1640, a rate of £200 was levied, "halfe upō estates and halfe upon lands." New Haven Col. Rec., I., 19, 40.

<sup>2</sup> Mr. Allen was required to pay taxes on such "stocke as is resident or usually employed" upon his land in Windsor. Conn. Col. Rec., I., 53.

<sup>3</sup> New Haven Col. Rec., I., 91, 192.

question, but the court decided that the Massachusetts system should be adopted, with the exception that houses and household goods should not be rated that year, but that if any man rented a house it should be listed at a moderate price. The price of cattle, ships and other property was to be according to the Massachusetts law.<sup>1</sup> The matter was finally settled November 29, 1649, when the court decided that all houses in the town should be "rated after ye rate of ten yeeres purchase, being vallewed at a moderate rent by the Comitee."<sup>2</sup> These provisions, with others, were incorporated into the New Haven laws of 1656, and agree with those of the Connecticut Code of Laws of 1650 (in many instances *verbatim*), with the exception that in the former, household stuff and goods for trade were exempted.<sup>3</sup>

Although taxes were laid upon properties coincident with land, yet it is altogether probable that in Connecticut, as in New Haven, the scope of the property tax was gradually widened so as to ultimately include almost all objects of value, and that for the purpose of lessening the burden of the tax upon land. Houses, mills, ships and smaller vessels,<sup>4</sup> "merchantable goods," cranes, wharves and all other "visible" estate "at home or at sea," were placed in the Grand List according to certain estimates of value, while cattle of all kinds were individually rated according to a permanent legal valuation governed by age.<sup>5</sup> These

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<sup>1</sup> New Haven Col. Rec., 499, 502; Levermore, "The Republic of New Haven," 78.

<sup>2</sup> *Ibid.*, 502.

<sup>3</sup> *Ibid.*, II., 581; Conn. Col. Rec., I., 548.

<sup>4</sup> The amount at which ships and vessels were placed upon the list was not stated until May, 1726, when it was made 15s per ton. Conn. Col. Rec., VII., 9; Douglass, "Summary of America," II., 177.

<sup>5</sup> Cows, heifers, steers, oxen, bulls, horses, mares, sheep, goats and swine were listed according to age. (Conn. Col. Rec., I., 549; Douglass, *ibid.*; Bronson, "Early Government of Connecticut," New Haven Hist. Soc. Papers, III., 353. Cf. Palfrey, "History of New



valuations differed but very little in the codes of Connecticut and of New Haven. The usurpation of Andros made no change whatever in the principle of rating property, although the rates, especially those for cattle, differed from what the Code of 1650 specified, which was due of course to the change of values.<sup>1</sup> The only innovation was a tax upon strangers, who were required to contribute towards the expenses of the government according to the amount of goods they imported.<sup>2</sup> During the colonial period, certain persons were exempted from payment of the property tax, and certain kinds of property were not taxable, but the exemptions were not numerous and never threatened the equality of the tax.<sup>3</sup>

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England," III., 54; Mass. Coll. Rec., IV., Part II., 367). The tax upon cattle was frequently avoided, usually in two ways: either by omitting them from the list, or sending them into other towns until the time of assessment was passed. To prevent the first, October, 1692, it was declared that all cattle omitted from the list should be forfeited, provided complaints were made within twelve months (Conn. Col. Rec., IV., 80). To prevent the second, October, 1728, it was enacted that all "animals" should be listed from the towns where found (*ibid.*, VII., 208). Previously, they were usually listed where they wintered (*ibid.*, II., 301; III., 3).

<sup>1</sup> *Ibid.*, III., 406. The depreciation in the value of live stock may be traced in the following references: Conn. Col. Rec., II., 28, 62, 102, 142; III., 406; IV., 74; New Haven Col. Rec., II., 332, 360, 405, 452.

<sup>2</sup> On failure of strangers to return a true list of their estate, the selectmen of the town assessed them in the same manner as other inhabitants were assessed. Conn. Col. Rec., III., 408.

<sup>3</sup> The following is a complete list of all exemptions during the period:

1. Properties exempted:

(a) Household goods and stock for trade (New Haven Col. Rec., II., 581). Confined to New Haven and soon discontinued.

(b) Cattle of all sorts under one year old. Conn. Col. Rec., I., 549.

(c) Hay and corn in the "husbandman's hand," because all meadow, arable ground and cattle were ratable. *Ibid.*

(d) Dwelling houses, barns and all houses (save warehouses), October, 1664. *Ibid.*, 433.

(e) Vessels owned in the colony and employed in the whale or cod fisheries for four months in the year. Enacted October, 1770,

*Poll Tax.*

The theory that every able-bodied man should bear a certain minimum portion of the government expenses was firmly held by the early inhabitants of Connecticut. They had been accustomed to the tax on polls in England, and when the principles of the Massachusetts system of taxation were incorporated into the Code of 1650, the principle of the poll tax was taken without the slightest hesitation.<sup>1</sup> By this code all male persons from sixteen years old and upwards were set in the list at two shillings six pence.<sup>2</sup> This was found to be too high and, October, 1651, was reduced to eighteen pence, but later, under Andros, raised

for the encouragement of the whale and cod fisheries, which, "if encouraged, might prove a source of wealth to the colony, extending trade, navigation and revenue." *Ibid.*, XIII., 365.

(f) "Each trooping horse." Douglass, "Summary of America," II., 179.

(g) All estates for ecclesiastical, educational and charitable uses. *Ibid.*, 196; Conn. Col. Rec., VIII., 133.

2. Persons exempted from the tax:

(a) Ministers of the Gospel. Principal acts, May 11, 1699, and October, 1706. See also Conn. Col. Rec., IV., 176, 198, 231, 287, 316, 335, 405, 530; V., 2; XIII., 360; New Haven Col. Rec., I., 457; II., 181; Palfrey, IV., 281; Trumbull, I., 400, 428; Douglass, II., 179. Cf. Mass. Laws, 132-4; Palfrey, III., 50.

(b) The President of Yale College. Douglass, II., 179.

(c) Other persons on special occasions, as loss by fire. Conn. Col. Rec., III., 215.

<sup>1</sup> Conn. Col. Rec., I., 548; Palfrey, "History of New England," III., 50, 60. The first poll tax was levied in Massachusetts, November 4, 1646. (Mass. Col. Rec., II., 173; Palfrey, II., 11.) The principle of the poll tax was introduced into the New Haven colony as early as July, 1643 (New Haven Col. Rec., I., 96, 118), and the tax levied certainly by November, 1649 (*ibid.*, 500). By the New Haven laws the polls were listed at 20s for all able-bodied males of sixteen years and upward (*ibid.*, II., 581).

<sup>2</sup> Interpreted May, 1713, as meaning "above" sixteen years (Conn. Col. Rec., IV., 412). Servants and children who received wages paid their own poll tax, otherwise their masters and parents paid it (Conn. Col. Rec., I., 548; VIII., 113; New Haven Col. Rec., II., 581).

again to one shilling eight pence.<sup>1</sup> Some misunderstanding in the matter having arisen, October, 1722, the Court explained that all physicians and surgeons were to be taxed for their polls as other citizens.<sup>2</sup> Later, October, 1727, justices were also taxed.<sup>3</sup> The act of October, 1737, is in most instances merely a restatement of principles of taxation already firmly established in the colony, but in so far as it is concerned with the poll tax it is very important.<sup>4</sup> It marks an important change in the manner of expressing the poll in the lists. Previous to this date, as has just been shown, the amount of the poll tax was placed at 2s 6d and 18d for each taxpayer—the base upon which it was reckoned being as many pounds as pence. After this date polls were placed in the lists at the fixed sum of £18 each, and each male person from sixteen years old to seventy, with certain exceptions, was listed and required to pay as much on his head as though he were the owner of £18 estate. The change was, however, one more of form than principle—a change from the expression of the thing to the thing itself, from 18d to its base £18. The exemptions from the poll tax were numerous and applied to persons disabled by sickness, lameness and old age, to persons engaged in the

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<sup>1</sup> Conn. Col. Rec., I., 229; III., 406; Bronson, "Early Government of Connecticut," New Haven Hist. Soc. Papers, III., 353. Cf. Palfrey, II., 261; III., 50.

<sup>2</sup> By a revision act of 1702, "allowed" physicians were exempted, says Dr. Bronson (III., 352). Dr. Rossiter, November 10, 1661, refused to pay the rate laid by the jurisdiction of New Haven, because, as he held, physicians were exempted in Massachusetts and Connecticut. Steiner, "MSS. History of Guilford."

<sup>3</sup> Conn. Col. Rec., VII., 143.

<sup>4</sup> Conn. Col. Rec., VIII., 132. Of course, before this time the polls were entered in the list with the estates according to their base, viz., 18d represented a listed value of £18. This is very evident from the Grand List of October, 1657, "the persons of Windsor are 161 . . . £2898." (Conn. Col. Rec., I., 308; Bronson, "Early Government of Connecticut," New Haven Hist. Soc. Papers, III., 353; Douglass, "Summary of America," II., 177. Cf. Palfrey, III., 60.)

ministry, in educational pursuits, in the management of the government, and in favored industries.<sup>1</sup>

*"Faculty" and Income Taxes.*

After having considered the adoption of the Massachusetts system of taxation, the New Haven committee recommended that some action be taken to require skilled laborers to bear their proportion of the taxes, and that merchants be rated according to their "trades and stockes."<sup>2</sup> The Connecticut Code of Laws made provision for that class of laborers who, by the advantage of their trades, were better able to contribute to the expenses of the government than

<sup>1</sup> I. On account of certain infirmities, as sickness, lameness, old age, etc., so as not to be self-supporting. Conn. Col. Rec., I., 549; III., 407; VI., 239; VIII., 133; New Haven Col. Rec., II., 581; Douglass, II., 177.

2. Ministers and their families, and elders of churches. Conn. Col. Rec., I., 548; VIII., 133; XIII., 360; New Haven Col. Rec., II., 581; Douglass, II., 177; Trumbull, I., 400, 428; Bronson, III., 352.

3. Rector of Yale College, tutors, school-masters and students of the college until the expiration of the time for taking their second degree. Conn. Col. Rec., VIII., 131-3; Douglass, II., 177; Bronson, III., 352.

4. Magistrates, Assistants, the Governor, Deputy Governor, Commissioners (while in office). Conn. Col. Rec., I., 548; II., 59; VIII., 133; New Haven Col. Rec., II., 581; Douglass, II., 177; Bronson, III., 352. The members of Andros' Council. Conn. Col. Rec., III., 406.

5. Persons engaged in favored occupations, as the iron works of New Haven (Conn. Col. Rec., II., 108), and the whale and cod fisheries (ibid., XIII., 365).

6. Those engaged in certain unusual military operations; as the officers and soldiers sent against Crown Point in the French and Indian War (Conn. Col. Rec., X., 424; XI., 182, 344), and December, 1775, those non-commissioned officers and soldiers employed in the Continental army during that year (ibid., XV., 197, 313).

7. Allowed physicians, until October, 1722. Bronson, III., 353. After May, 1721, any person above seventy years old. Conn. Col. Rec., VI., 239.

<sup>2</sup> New Haven Col. Rec., I., 494. October, 1763, licensed tavern-keepers were rated according to their gains. Conn. Col. Rec., XII., 191.



common laborers.<sup>1</sup> They were rated according to their gains just as other men were for the probable income of their estates. The law continued practically the same under Andros,<sup>2</sup> and throughout the period with certain modifications until the whole subject was minutely outlined by the important act of October, 1771. The compass of the tax gradually grew larger. October, 1737, attorneys-at-law were listed for their "faculty"—the least practitioners at £50 and others in proportion to their practice.<sup>3</sup> An income tax was laid May, 1757, when the General Court enacted that all persons who loaned or let out money should be rated in the list in proportion to their gains.<sup>4</sup> Before October, 1771, the rates at which "faculties" were to be put in the Grand List had not been stated by law, but left to the discretion of the listers, who performed their duty in a not very satisfactory manner; consequently there was confusion and inequality in the rating. At this date, these rates were specified, and all the tiresome details of an income tax introduced. Retail traders were listed at ten per cent. on the price cost of their stock;<sup>5</sup> wholesale traders, artificers, tavern-keepers and others rated for their business were listed in proportion to their profits and incomes.<sup>6</sup> "Curricles," chaises and other wheel-carriages, with or

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<sup>1</sup> As "butchers, bakers, brewers, victuallers, smiths, carpenters, tailors, shoemakers, joiners, barbers, millers and all other manual persons and artists." Conn. Col. Rec., I., 549; III., 405. Cf. Massachusetts Records, II., 173; Palfrey, "History of New England," II., 262. The New Haven laws agree with those of Connecticut word for word. New Haven Col. Rec., II., 582.

<sup>2</sup> Merchants, shop-keepers and "factors" were assessed at the discretion of the listers. Conn. Col. Rec., III., 405; VIII., 132.

<sup>3</sup> Conn. Col. Rec., VI., 525; Douglass, "Summary of America," II., 178.

<sup>4</sup> As "traders and tradesmen." Conn. Col. Rec., XI., 14.

<sup>5</sup> Home products and home manufactures excepted.

<sup>6</sup> Those who suffered loss or were unsuccessful in their business, on application, received abatement. Those overcharged could be relieved by proving the same to the listers, selectmen, or others in authority.

without tops;<sup>1</sup> dwelling houses, according to the number of stories, rooms or fire-places<sup>2</sup>—all were placed in the lists at certain specified rates.<sup>3</sup>

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<sup>1</sup> With tops, £5; without, £3 each.

<sup>2</sup> One story, two rooms, and two fire-places, £1; three rooms and three fire-places, 30s; four rooms and four fire-places, £2. One story, two rooms and two fire-places, £2; more than two rooms and two fire-places, £3.

<sup>3</sup> Conn. Col. Rec., XIII., 513.

### CHAPTER III.

#### THE GRAND LIST.

*Code of 1650.*

Previous to November, 1650, whenever the General Court agreed upon a sum of money to be levied upon the towns for the management of the affairs of the colony, a committee was appointed, composed of an equal number from each town, who determined what proportion of the assessment each town should pay.<sup>1</sup> No system could be more simple than this, and in fact it soon became too simple to meet the requirements of a growing community. It was soon found that the want of a uniform and well-defined system of assessment and collection of taxes, and the undefined duties and powers of officers, caused the rate to fall unequally upon towns and individuals, and made its collection inconvenient and precarious.<sup>2</sup> Consequently there soon grew up a general demand for a change of system which culminated in the order of the General Court, April, 1646, when Mr. Ludlow was requested to draw up a body of laws for the government of the commonwealth and present it at the next session.<sup>3</sup> This he did not do until May, 1650, when the laws were adopted.<sup>4</sup> The old system was thus

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<sup>1</sup> The last of the historic "Eleven Fundamental Orders" treats of taxation: "It is ordered, sentenced and decreed, that when any Generall Courte vppon the occations of the Cõmonwelth haue agreed vppon any sūme or sōmes of mony to be leuyed vppon the seuerall Townes w<sup>th</sup>in this Jurisdiction, that a Cõmītee be chosen to sett out and appoynt w<sup>t</sup> shall be the p<sup>r</sup>portion of euery Towne to pay of the said leuy, p<sup>r</sup>vided the Cõmītees be made vp of an equall nmber out of each Towne." (Conn. Col. Rec., I., 25; Johnston, "History of Connecticut.") The first tax laid according to this law was one of £100, one-half to be collected in one month and the other half in three months. It was apportioned by the three assessors as follows: Hartford, £43; Windsor, £28 6s 8d; and Wethersfield, £28 13s 4d. Conn. Col. Rec., I., 32.

<sup>2</sup> Conn. Col. Rec., I., 201, 355, 548. <sup>3</sup> Ibid., 138, 154. <sup>4</sup> Ibid., 509.

abandoned and superseded by the principle of the Grand List which was taken from the Massachusetts system.<sup>1</sup> A new system was needed so badly, and this supplied the need so well, that there was no objection to its adoption, and practically no fault found with its operation; and with but few modifications it continued to be the system until the adoption of the constitution of 1818. The first recorded Grand List was for the year 1651,<sup>2</sup> but it is very evident that the new law went into effect immediately, and that the tax levied November, 1650, was collected upon the basis of lists of persons and estates returned by the towns in that year.<sup>3</sup>

The Grand List,<sup>4</sup> which was a list of all the ratable persons and estates of the colony by towns, formed the foun-

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<sup>1</sup> Massachusetts adopted the system November 4, 1646. It was the result of a growing feeling that the old system (essentially the same as that of Connecticut) had become inadequate to the needs of a rapidly growing colony. As in Connecticut, they thought at first the constables and other officers were to blame, and accordingly passed stringent laws governing them which involved heavy fines (Mass. Col. Rec., IV., Pt. I., 247. Cf. Conn. Col. Rec., I., 17, 30, 34, 550). Connecticut thus demonstrated her principle of following the "Bay Horse" when he went in the right direction. (Mass. Col. Rec., II., 174-5; Douglas, "Financial History of Massachusetts," 23.)

<sup>2</sup> The lists of only seven towns were returned, the others either having been exempted from taxation or their lists not having been completed. The amount of the whole was £75,492 10s 6d, Hartford leading the list with £22,404 19s (Conn. Col. Rec., I., 229; Trumbull, "History of Connecticut," I., 201). Dr. Bronson ("Early Government of Connecticut," New Haven Hist. Soc. Papers, III., 353) mentions but six; he omits Saybrook. The towns had lists of persons and estates, upon which was based their local tax, much earlier than 1650. New Haven presents a list as early as 1643 (New Haven Col. Rec., I., 91).

<sup>3</sup> No rate was levied in 1649, but November, 1650, Fairfield was fined for not returning her list of persons and estates according to a previous order of the Court, and furthermore required to pay taxes according to the estate it formerly gave in (Conn. Col. Rec., I., 213, 225). At the same session the treasurer was required to send his warrants to the towns, directing that the taxes be collected according to the "rule in the Courte for the present year."

<sup>4</sup> Sometimes called the "General List." Peters, "General History of Connecticut," 196-7.



dation upon which the revenue was raised. The details of its construction will be considered at length under the discussion of the officials who were concerned in that construction; in brief, however, as outlined by the Code of Laws, it was this: the treasurer annually sent his warrants to the constables and selectmen of the towns, requiring them to call together the inhabitants who, being thus assembled, chose three or four of their number to act as listers, one of whom should be a commissioner. The listers made a list of the male persons in their towns and a true estimate of all personal and real estate, and, with the aid of the selectmen, assessed the property according to principles outlined in the preceding chapter. At a certain specified time, the commissioners (later the deputies of the General Court) assembled at Hartford, and having corrected and equalized the lists, returned them to the General Court. The system as it existed in the New Haven colony, presents no differences whatever from that of Connecticut, as outlined in the Code of Laws. It was introduced in the same year and from the same source.<sup>1</sup>

*Officers: Powers; Duties.*

A commissioner was chosen by each town, at first in March, but later (1687) in July. This official, in so far as his connection with the system of taxation is concerned, was short-lived.<sup>2</sup> On the third Thursday in August he met the commissioners of the other towns at Hartford, and with

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<sup>1</sup> In August, 1651, general tax-lists appeared. The Court then ordered that "all men betwixt this and this day seven-night must bring to those appointed in their several quarters a note of their persons, land, meadow, cattle, houses and other estates" (Levermore, "The Republic of New Haven," 78). The records of the jurisdiction from 1649 to 1653 are lost; consequently, we can speak only for the town of New Haven.

<sup>2</sup> In 1665 the commissioner was given "magistratical" power. In this function he was superseded in January, 1698, by the justice of the peace. C. M. Andrews, "River Towns of Connecticut," J. H. U. Studies, Seventh Series, VII-VIII-IX., 102-3.

them, carefully inspected and equalized the lists.<sup>1</sup> On the second Thursday in September they returned these lists duly signed by the General Court—this was the Grand List.<sup>2</sup> If any of the commissioners or selectmen willfully failed to perform the trust committed to them, they were fined usually according to the injury inflicted upon the colony by that neglect.<sup>3</sup> October, 1666, the powers of the commissioner as inspector were taken away and transferred to one of the deputies of the town. These powers were temporarily returned to the commissioner in 1687, under the Andros administration, and a few minor changes in the details of the office introduced. The commissioners were chosen in July, and not in March, as formerly; they inspected the lists at their county towns and not at Hartford; and they returned them to the treasurer instead of to the General Court.<sup>4</sup> These changes were necessitated by reason of the change of government from a democracy to a despotism—there being no General Court, and the treasurer representing the central authority in that colony—but they lasted no longer than the power of him who made them.

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<sup>1</sup> Before May, 1651, an exception was made in the case of the commissioners of Fairfield and Stratford, who on the same day met at one of those towns, but two days before the session of the General Court in September met the other commissioners at Hartford (Conn. Col. Rec., I., 549). May, 1651, the former requirement was dropped, and only the latter remained in force (*ibid.*, 221). If these commissioners could not agree in their inspection of the lists, they presented their differences to the Court which settled the matter.

<sup>2</sup> The Grand List previous to October, 1659, usually gave the persons and estates in separate lists, but after that date they were generally combined. For this reason a comparative study of the revenue from polls and estates is prevented.

<sup>3</sup> The fine was not to exceed forty shillings for each offense, and the case was to be prosecuted within six months (Conn. Col. Rec., I., 549). Under Andros, neither the fine nor the time for prosecution was limited (*ibid.*, III., 407). Commissioners were frequently fined for neglect of duty (*ibid.*, I., 278, 364, 379), and towns for not returning lists (*ibid.*, 279, 405).

<sup>4</sup> *Ibid.*, III., 406-7.

In spite of the frequent admonition from the General Court, and punishment by way of fines, the commissioners would not meet at Hartford with any degree of regularity at the time appointed for the purpose of inspecting the lists. The efficiency of the system of taxation was threatened by this indifference, but instead of placing more fines, the Court decided very wisely to remedy the evil by changing the system. The commissioners had probably found it difficult to meet at Hartford for the sole purpose of inspecting the lists, so the duty was transferred to the deputies, who were already required to attend the sessions of the General Court.<sup>1</sup> The plan was the one pursued by the New Haven colony prior to the union.<sup>2</sup> October, 1692, the deputies were relieved of this duty, and special men (one from each town) were appointed to inspect the lists and to return them corrected, to the next session of the county court.<sup>3</sup> This arrangement did not prove in any respect superior to the old, and October, 1703, the deputies were required to assume the duties of the inspector once more.<sup>4</sup> The final separation took place May, 1705, when the duties of inspector became merged in those of the lister.<sup>5</sup> This official was, no doubt, the proper one to perform this duty, and continued to do so throughout the period, with the

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<sup>1</sup> Each town sent in its list by one of its deputies. These deputies met every year in October, on the first day of the sitting of the General Court, perfected the lists and presented them to the Court. A fine of £5 was laid upon the town that neglected to return its list (Conn. Col. Rec., II., 48). May, 1701, the October session of the Court was transferred to New Haven, where the lists were sent after that date (*ibid.*, IV., 343-4).

<sup>2</sup> New Haven Col. Rec., II., 581.

<sup>3</sup> Cattle omitted from the lists were forfeited to the inspector and colony. Inspectors were required to take an oath, and on refusal to accept office were fined 40s. This was the oath: "You A. B. being chosen to present all such person or persons as shall neglect to giue a true accot of theire stocks of cattell horss and swine to the list makers according to law doe swear by the name of God that you will without fauoure and affection attend the duty of your place. . . ." Conn. Col. Rec., IV., 81.

<sup>4</sup> *Ibid.*, 440.

<sup>5</sup> *Ibid.*, 503.

exception of two years, when special inspectors were again appointed.<sup>1</sup> The listers sat as inspectors from the first of October to the last of December.<sup>2</sup>

By the Code of Laws, the towns, sometime in August, chose three or four men, all of whom, save one, acted as listers. Under Andros the functions of the lister were given to the commissioner<sup>3</sup> and the selectmen, but were returned to the former official in 1689, on the resumption of charter government. By the complete severance of the commissioner from all relations to the system of taxation, October, 1666, and the final abolition of the special office of inspector, May, 1705, all powers of making and correcting the lists were given the listers. The number of listers, May, 1724, was changed from three or four to as many as the towns at their annual meeting, should decide were necessary, provided the number did not exceed nine.<sup>4</sup> On account of the growth of the larger towns, even this number was found too small, and May, 1768, all limitation as to number was withdrawn.<sup>5</sup> Before assuming the duties of their office, listers were required to take an oath very similar to that of the inspector.<sup>6</sup> Prior to May, 1703, this was not the

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<sup>1</sup> From May, 1712, to October, 1714, a few modifications were made; only one-half of omitted property was forfeited; the inspectors examined the lists from the time of perfecting them until new inspectors were chosen. The forfeiture for lands left out of the lists was 6s an acre. *Ibid.*, V., 335.

<sup>2</sup> *Ibid.*, 473. Some trouble was caused by repealing the law (*ibid.*, 497).

<sup>3</sup> *Conn. Col. Rec.*, III., 406; Palfrey, "History of New England," III., 520.

<sup>4</sup> *Ibid.*, VI., 463; Douglass, "Summary of America," II., 176.

<sup>5</sup> *Ibid.*, XIII., 74.

<sup>6</sup> "Listers Oath: You A. B. being chosen Lister for the town of H. for the year ensuing doe swear, that you dilligently and faithfully discharge and execute the office of lister within the limitts whereto you are appointed, and that in and by all the perticulars mentioned in the lawes whereto your office hath relation, and that you will do therein impartially according to law, without fear or favour according to the best of your abilitie. . ." (*ibid.*, V., 439). In case of refusal to serve, listers suffered the same fine as other town officers refusing office.



case. The time fixed by the Code of Laws for warning the inhabitants to send in their lists was August.<sup>1</sup> May, 1705, the time was changed to July, and the lists were required to be handed in not later than the 20th of August.<sup>2</sup> The warning was at first given by the listers in person or by note, but, by an act of May, 1712, they were allowed to deputize others to give it.<sup>3</sup> Even this being found "difficult, troublesome and burdensome," October, 1719, it was declared sufficient warning for the listers to have posted signed notifications upon town posts in two or three public places.<sup>4</sup> The law was again modified May, 1775, when, in addition to a signed notice posted in the centre of each society, the listers were required to send a written notice to every inhabitant.<sup>5</sup>

In case any were overcharged in the lists they could get relief by applying to the listers, who directed a bill to the constable and treasurer stating that such was the case.<sup>6</sup> Should the listers refuse to issue such a bill of errors, the aggrieved party could appeal to an assistant or a justice of the peace, who, with the assistance of the majority of the selectmen, reviewed the case, and granted relief if they thought just.<sup>7</sup> The same applied to the constable when the list was overcharged in the total.<sup>8</sup> It was found that

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<sup>1</sup> Conn. Col. Rec., I., 548.

<sup>2</sup> Ibid., IV., 503. Afterwards, not later than September 10. Douglass, "Summary," II., 177.

<sup>3</sup> Ibid., V., 335.

<sup>4</sup> The law was to be read annually at the town meeting by the clerk. Although it was to continue in force but two years, yet it was not changed until 1775. Ibid., 155.

<sup>5</sup> After being warned, should any of the inhabitants refuse or neglect to send in their lists, they, at first, forfeited all goods not returned (ibid., I., 319-20, 429, 434; III., 3, 112, 124), but later this was changed to one-half.

<sup>6</sup> Conn. Col. Rec., IV., 409.

<sup>7</sup> Douglass, "Summary," II., 177. May, 1707, the General Assembly declared that listers could not be prosecuted at common law for any error or mistake committed by them in making up the lists. Ibid., IV., 21.

<sup>8</sup> Restated May, 1713 (ibid., V., 385). Cf. ibid., VII., 466.

too much time was consumed examining the individual lists at the October session of the General Court, and after October, 1706, simply the sum-total was sent in by the listers.<sup>1</sup> To prevent the lists being altered or lost, the listers were required, May, 1730, to deliver their lists in January to the town clerk, taking his receipt. The clerks kept them for the use of the constables, rate-makers and collectors of the ministers, town and society rates.<sup>2</sup>

The principle of "will and doom" was declared as early as September, 1689.<sup>3</sup> If any persons failed in any way to hand in a complete list of their ratable estate, having been warned according to law, they were assessed by the listers at discretion—rated "will and doom." They were not excused should the listers fail to warn them in the time specified by law, and on being warned at any time not later than the first of May following, they were required to hand in their lists.<sup>4</sup> The principle applied not only to persons but to delinquent towns.<sup>5</sup> When a town neglected to send in a list of its persons and estates, the General Assembly took the action suggested by the facts of the case. Sometimes a committee of from two to four men was appointed who made up the list as best they could from lists volunteered by inhabitants, from land records, and from the opinion of neighbors.<sup>6</sup> Usually, however, the secretary was ordered to direct the sheriff of the county to summon the selectmen, or in their absence, three inhabitants, to make

<sup>1</sup> By an act of October, 1717, when listers returned the sum-total of their lists to the General Court in October, they were required to transmit a certificate from the assistant, justice of the peace, or town clerk before whom they were sworn, stating that such was done. The fine for not sending in either the sum-total or the certificate was £10. *Ibid.*, VI., 21; X., 148.

<sup>2</sup> *Conn. Col. Rec.*, VII., 288.

<sup>3</sup> *Ibid.*, IV., 6.

<sup>4</sup> *Ibid.*, IV., 439, 502.

<sup>5</sup> *Ibid.*, VII., 38.

<sup>6</sup> *Ibid.*, V., 581.

<sup>7</sup> *Conn. Col. Rec.*, IV., 35, 38, 331, 340. A committee of the Assembly was usually appointed to rectify imperfect town lists at the October session (*ibid.*, 56, 79).

out a list.<sup>1</sup> Should this fail, the listers of any neighboring town were directed to make the list, "will and doom."

Fourfolding, or the custom of assessing all ratable estate omitted from the lists at four times its value as a penalty, was introduced October, 1703.<sup>2</sup> It took the place of the earlier law of forfeiture. From the first of October until the last of December the listers sat as inspectors, and on all ratable property they found omitted, they increased the assessment fourfold. The listers sent the sum-total of these fourfold additions by the deputies to the General Assembly in May, and the secretary transmitted an account to the treasurer.<sup>3</sup> For very good reasons, and by application to the proper sources, relief could be had from the fourfold burden.<sup>4</sup>

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<sup>1</sup> Ibid., V., 133. Less frequently the county marshal was given a general search warrant to secure the detained list; and inhabitants who held their lists back were fined (ibid., IV., 237, 331).

<sup>2</sup> Ibid., IV., 439. Douglass, "Summary of America," II., 177.

<sup>3</sup> May, 1705. Conn. Col. Rec., IV., 503. On failure to send in this sum-total, listers suffered the same penalty as provided for not sending in the original list, viz., £10. (October, 1736; ibid., VIII., 56.) Persons frequently avoided taxation by selling or spiriting away property just before the lists were made. Live stock, too, was left out of the list and then killed. The Assembly found it necessary to provide for these irregularities by statute.

<sup>4</sup> Relief could be had for these reasons: (a) If it could be made apparent to the county court that either no notice had been received from the listers, or that by some "inevitable providence" the delinquent had been unable to hand in his list (ibid., 439). (b) If it could be proven that the property did not belong to the person on the 20th of August preceding; or that it was not left out "willfully," but because he thought the property was not his, and that as soon as he became aware of his error he sent in his list (ibid., V., 472; VI., 308). For cases, cf. ibid., 451; VII., 107; VIII., 182; IX., 368; X., 530; XI., 88, 269, 341, 545, 554.

Relief could be had on application to: (a) The county court (ibid., 439). (b) October, 1751, changed to an assistant or justice of the peace, with two of the selectmen (ibid., X., 45; Douglass, "Summary," II., 177). This change was the result of a great many complaints. (c) May, 1768, relief could be had on application to the General Assembly (ibid., XIV., 130).

## CHAPTER IV.

### RATES.

#### *Power to Levy.*

The early settlers of Connecticut, profiting by the experience of the Watertown incident,<sup>1</sup> took particular care that the expenditure of the funds of the colony should be thoroughly under the control of the more popular branch of the legislative body. Unlike the Massachusetts Bay colony, there were no struggles on the part of the deputies for the exclusive right of originating money bills. From the first this privilege was never questioned either by the Governor and Council—the embryonic Senate—or by the

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<sup>1</sup> The facts in the case were these: The Governor and assistants of Massachusetts Bay voted a rate of £60 to meet the cost of building a palisado for Cambridge. Warrants were sent to collect Watertown's portion, which was £8. The pastor and elders assembled the people who delivered their opinions, "that it was not safe to pay moneys after that sort, for fear of bringing themselves and posterity into bondage." For this, February 7, 1631, the pastors and elders were brought before the Governor and assistants, where, instead of arguing that the assistants had no power to levy a tax, since they had ceased to be elected properly, they urged that "this government was no other but as of a mayor and alderman, who have no power to make laws or raise taxations without the people." Winthrop answered this by saying that "this government was rather in the nature of a parliament, and that no assistant could be chosen but by the freemen, who had power likewise to remove the assistants and put in others." "After much debate," the Watertown people acknowledged that they were in error and made a "humble admission." The Governor and assistants had no power whatever by the charter to raise money by levy, assessment or taxation, and, although the matter was finally settled, yet it continued to rankle in the breasts of the Watertown people who represented the democratic element as against the oligarchic spirit of the Governor and assistants, and was probably one of the causes of the secession of the three towns to Connecticut in 1634-5. Winthrop, "History of New England," I., 84; Doyle, I., 139; G. H. Haynes, "Representation and Suffrage in Massachusetts (1620-1691)," J. H. U. Studies, Twelfth Series, VIII.-IX., 17.



Upper House after it became definitely established October, 1698.<sup>1</sup> There is an instance when the Council between the sessions of the General Court granted an additional rate of six pence upon the pound to meet the increased expenses of an Indian war, but its action was submitted to the General Court at the next session for confirmation.<sup>2</sup>

During the suspension of charter government under Andros, the power of levying the rate was vested in that individual and his subservient Council—but practically in him, for he frequently disregarded the advice of the majority of his Council. Andros, in fact, with the concurrence of the traitor, Randolph, and four or five others of like character, taxed the people much as he pleased, without an assembly and without the consent of the people directly or indirectly.<sup>3</sup> Although there is not the slightest doubt that taxes were levied and collected in the most despotic and arbitrary manner, yet the right of Andros and his council to levy taxes upon sections of New England from a strictly legal point of view might be maintained with a certain amount of

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<sup>1</sup> Conn. Col. Rec., IV., 267.

<sup>2</sup> This occurred January 24, 1675, and is the only instance that is definitely stated. The Governor and Council, from powers granted as early as March, 1662(3), sat during the intervals of the sessions of the General Court "to act in emerg<sup>t</sup> occasions that concerne y<sup>e</sup> welfare" of the colony. With these powers and "by the advice and with the consent of the assistants of the sea-side and the Deputies of the county of Hartford" and three other men, the Council, January 24, 1675, deeming it necessary for the prosecution of the Indian war, added a rate of six pence per pound to the six pence which the Court had already granted (*ibid.*, II., 401). At the next session of the General Court, May, 1676, the Council gave to the General Court "a briefe accot<sup>t</sup> of their transactions and prosecutions of the war against the Indians, in rayseing of money for the defraying of that publique charge." "The Court haueing considered the premises, doe take sattisfaction in what hath been declared to be done by the sayd Councill and approue of the same." (*Ibid.*, II., 275.)

<sup>3</sup> "Andros Tracts," II., 210; Trumbull, "History of Connecticut," I., 373.

force.<sup>1</sup> No colony felt the change from the democratic method of taxation to the despotic method pursued by Andros more grievously than did Connecticut, but there was little or no opposition in comparison to that aroused in Massachusetts. Of course, there were some protests, but the colony on the whole, pursued its traditional policy of making the best of the situation and of awaiting a favorable opportunity to remedy it.

### Form.

Before the adoption of the Code of Laws in 1650, it was the custom in Connecticut for the General Court to state the amount of the rate in a lump sum, and then apportion it among the towns according to some rough estimate of ability. The rate was expressed as "so many pounds," and its amount varied as the expenses of the colony.<sup>2</sup> The same system existed in the New Haven colony prior to the adoption of the laws of 1656, although the rate was expressed differently.<sup>3</sup> By the introduction of the Grand

<sup>1</sup> The following reasons seem to support this view:

1. Charter government had been discontinued in Massachusetts by writ of *quo warranto* and the government invested in Andros and his Council. The King's right to issue those warrants at that time can scarcely be questioned. The *quo warranto* against the charter of Connecticut was undecided.

2. Andros held the power to levy taxes from the King and Privy Council. As late as 1763 the courts declared that the King had authority to levy taxes upon colonies. "Andros Tracts," II., 210. In extenuation of the system of taxation imposed upon the colonies, it might be added that it was not a strange one. Andros adopted the Massachusetts code of 1649, which had been adopted by Connecticut and New Haven. It had also been confirmed by the King. At that time it was claimed (John Palmer, "Andros Tracts," I., 80) that this law was repealed October 10, 1683, but as it was probably done in anticipation of the coming trouble, it can scarcely be urged as a counter-argument. Plymouth had not adopted this code of laws, but there was little difference between the system of that colony and that of Massachusetts.

<sup>2</sup> Conn. Col. Rec., I., 25; New Haven Col. Rec., I., 25.

<sup>3</sup> A "whole yeares rate" (New Haven Col. Rec., I., 83); "halfe a rate" (ibid., II., 478); "a halfe years rate" (ibid., I., 230, 310);

List, the method of levying the rate was necessarily changed in both of the colonies. The Grand List became the basis upon which the General Court levied the tax.<sup>1</sup> It was expressed as a certain per cent. of the listed property,<sup>2</sup> and could be paid in money or "country pay."<sup>3</sup> During the Andros rule, the rate was one penny on the pound on all estates, personal and real, and the warrants for its collection were issued by the treasurer. The rates levied for the redemption of bills of credit were sometimes expressed as

"1 year and a halfe rate" (ibid., 482); or a "single rate" (ibid., II., 457). These rates were paid in equal portions, semi-annually, by the last of April and by the last of October. On extraordinary occasions other assessments were made (ibid., I., 193).

<sup>1</sup> *Supra*, p. 30.

<sup>2</sup> The treasurer was directed to send out his warrants for the collection of a tax equal to a "whole rate," or one penny on the pound (Conn. Col. Rec., I., 229, 266); or "halfe a Rate" (ibid., 236); or a "Rate & halfe" (ibid., 249); or "a penny in the pound" (ibid., 279, 373, 425); or "three farthings in the pound" (ibid., 285); "three half pence in ye £" (ibid., II., 52); "penny farthing" (ibid., 143); "sixpence" (ibid., 269); "eight pence" (ibid., 322); "eighteen pence" (ibid., 292); etc. The first rate levied under the percentage method was one of a "whole rate" upon the first Grand List, October, 1651 (Johnston, "History of Connecticut," 137; Conn. Col. Rec., I., 279).

<sup>3</sup> Rates were paid in "kind," wampum and money: (a) The price at which the products were received was annually stated for each. The process by which the payment in "kind" was gradually superseded by payment in money exclusively is interesting: First, the quantity of certain products was limited (1709); then the whole rate was ordered to be paid in a certain product; then a premium was placed upon payment in money by receiving it at an advance of a third or half (Conn. Col. Rec., III., 92, 160, 189, 213, 219). Payment in kind was abolished May, 1710 (ibid., V., 157), but was resumed again when the exigencies of the time demanded it, in 1720, and again during the French and Indian war in 1755 and 1757, but that is the last instance. (b) Wampum was received at certain prices, according to kind and quality. It was retained as a currency as late as 1704, and probably later. Conn. Col. Rec., I., 61; New Haven Col. Rec., I., 211; Roger Williams in Felt's "Massachusetts Currency." (c) The coins of England, Holland, Spain, and Massachusetts circulated freely, and were received at certain values, later prescribed by Parliament. Felt, "Massachusetts Currency," 26, 31; Mass. Col. Rec., I., 86; Bronson, "Connecticut Currency," 16 *et seq.*

a lump sum, but it was the exception rather than the rule: after 1746 the percentage method only was used.

*Reduplication.*

The proportion of one penny per pound upon the assessed value of the persons and estates was at first the usual annual rate, and was considered quite sufficient to meet the public expenses. Soon, however, on account of the extremely slow growth of the Grand List,<sup>1</sup> and the large increase of the yearly budget, this unvarying rate became insufficient to meet the public expenses. Two methods were employed to remedy this: the legal fiction of the rate being a penny a pound a year was retained, but was either increased double, treble, etc., or by one of its factors; or on the other hand the rate was ordered twice or thrice a year. Thus the one penny a pound rate ceased to be *the* rate and became *a* rate.<sup>2</sup> Had it not been for their pernicious effect upon the poll tax, these methods of meeting the increased expenses of the colony would have been very ingenious and efficient. This practice undoubtedly resulted in great inequality of taxation to the disadvantage of those least able to bear it—those who possessed little or no property and paid merely a poll tax. It must be borne in mind that polls and estates were set in the same list at fixed values, and the rate levied upon the whole without distinction.<sup>3</sup> Now when it became customary to double, treble and quadruple the rate, or to levy two, three and four rates a year, rather than the one penny a pound rate, as the custom had formerly been, the poll tax as well as the property tax was increased accordingly. The poll tax being the same for the poor as for the rich, the reduplication fell with crushing weight upon those who had little or no property, in the form of a most pernicious regressive tax. When it is recalled that in times of

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<sup>1</sup> The Appendix will show this slow growth.

<sup>2</sup> Cf. Douglass, "Financial History of Massachusetts."

<sup>3</sup> Johnston, "History of Connecticut," 267.



heavy expenditure, the rate reached as high as eleven and eighteen<sup>1</sup> pence per pound during the year, it will readily be seen what a serious matter this method of reduplication must have been to the small property-holders. The practice had long obtained in England and was the cause of much complaint in the Massachusetts Bay colony.<sup>2</sup> Strange to say, there was no protest made in Connecticut against the inequality, as there was in Massachusetts.<sup>3</sup> That this was the case is probably due to the fact that property had not become centralized in the hands of a few.

### *Exemptions.*

Another custom that threatened to disturb the equality of the tax was that of exempting towns partially or wholly from the public tax for a certain number of years. Owing to the prudent application of this practice by the General Court it did not result in serious inequality of taxation. Exemptions were given for very good reasons,<sup>4</sup> and in most

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<sup>1</sup> October, 1676, during King Philip's War, the General Court levied a rate of 18d a pound; for three years after the war the rate was 11d per pound upon the Grand List, exclusive of all town and parish taxes (Conn. Col. Rec., II., 292; Trumbull, "History of Connecticut," I., 351). In this same war, 1676, the Massachusetts colony levied a rate of 16d per pound, the average for the whole war being about 4d (Douglas, "Financial History of Massachusetts," 29).

<sup>2</sup> Douglas, "The Financial History of Massachusetts," 30.

<sup>3</sup> The townsmen of Boston in 1653 petitioned against this inequality: "In respect of polle money we apprehend its parallel is not in any country where the sword is not drawn in offensive or defensive war." Mass. Archives, c, 44.

<sup>4</sup> For the "incouragement" of a town. May, 1649, the first exemption (Conn. Col. Rec., I., 185; also New Haven Col. Rec., I., 157); on becoming a town (ibid., I., 157; Conn. Col. Rec., I., 348); a new plantation just founded (ibid., II., 113, etc.; III., 240, etc.); to help establish a church (ibid., III., 2, 57); to build a mill (ibid., V., 98); to build a school-house; because of having suffered from the ravages of Indians, wars, etc. (cf. Mass. Col. Rec., IV., Pt. I., 262; II., 21; V., 13, 122).

instances there was a clear understanding that the colony was not to be at any expense for that town during the period of exemption.<sup>1</sup>

### *Bills of Credit.*

From the recovery of the charter at the accession of William and Mary, 1689, to the end of the period, the financial history of the colony is closely connected with the struggles with the French and Indians. The whole amount of taxes levied during King William's War was 20d on the pound.<sup>2</sup> Queen Anne's War broke out in 1702, and, owing to mismanagement and treachery on the part of the leaders of her allies, Dudley of Massachusetts and Cornbury of New York, matters became very gloomy. There was only about £2000 circulating cash. So great had been the expenses of the colony that in three years the General Assembly was compelled to levy taxes of more than two shillings upon the pound on the whole ratable list of the colony.<sup>3</sup> At this period such a condition of affairs could have but one result—the issuance of bills of credit. Until 1709, Connecticut had conducted its financial affairs upon a money basis. The tax rates had been raised or lowered according to the needs of the colony. On account of these wars the expenses had become enormous,<sup>4</sup> while neither the wealth of

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<sup>1</sup> Conn. Col. Rec., II., 249; Trumbull, I., 451.

<sup>2</sup> By 1695 the colony had expended £7000 for the defense of her neighbors, £3000 for the Canadian expedition, and £2000 for the rest of the war, making a total of £12,000. Trumbull, "History of Connecticut," I., 351.

<sup>3</sup> Trumbull, "History of Connecticut," I., 428.

<sup>4</sup> The taxes, usually one, two, three, and at the greatest in times of peace four pence on the pound, had risen to seven or eight pence—"a ruinous rate for a poor and struggling agricultural commonwealth, whose own governmental expenses were kept down to the lowest point" (Johnston, "History of Connecticut," 254). The expenses of the government at this period were inconsiderable; they scarcely amounted to the salary of a King's Governor. "The ex-

the colony nor its financial astuteness had grown apace. The old system would not produce the required revenue, and the colonists knew of no other sound method, so they followed the treacherous course that their neighbors, Massachusetts Bay and Rhode Island, had already taken. June, 1709, the General Assembly was compelled to issue £8000 bills of credit.<sup>1</sup> To redeem this issue a special tax of ten pence per pound was voted; it was to be paid in two annual installments. By this act, Connecticut inaugurated her policy of levying a tax, in conjunction with every issue of bills of credit, large enough to redeem the issue and to pay the expenses of collection. This policy was departed from in but few instances,<sup>2</sup> and distinguishes this colony from her reckless neighbors, especially Rhode Island. From June, 1709, to October, 1713, including emissions to be exchanged for older issues, £40,500 were issued.<sup>3</sup> During King George's War there were issued about £80,000, and during the French and Indian War, £359,000. In nearly every instance, a tax was levied to redeem these issues, and the value of the articles in which the tax was payable, stated.<sup>4</sup>

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penses of the two sessions annually hardly amounted to £400. The salary of the Governor was £200, and that of the Deputy Governor £50. The whole expense of government did not probably exceed £800 annually" (Trumbull, "*History of Connecticut*," I., 435).

<sup>1</sup> Conn. Col. Rec., IV., 111. The form of the bill was taken from Massachusetts.

<sup>2</sup> Ibid., VI., 325, 363. Where a tax was not levied in conjunction with the issue it was usually voted some time later in the year. In 1751 Parliament required a tax to be levied for every emission.

<sup>3</sup> Trumbull (I., 450) gives it £35,500, and Bronson (86) omits several issues from his list.

<sup>4</sup> These rates were usually payable in produce; bills of credit of Connecticut, at the advance of one shilling on the pound, (October, 1719, bills of credit of Massachusetts Bay, New York, Rhode Island or New Hampshire, having "four signers," but with no advance upon them, as in the case of bills of Connecticut); silver at 8s per ounce troy, and gold equivalent. May, 1776, the Continental bills at full face value (Conn. Col. Rec., XV., 306). Restrictions were later placed upon the acceptance of the bills of other colonies (October, 1771).

Although this paper currency (especially that of the old tenor)<sup>1</sup> became very much depreciated, and the colony suffered considerably from financial depression, yet her condition was prosperous in comparison with that of the other colonies.<sup>2</sup> Connecticut's policy with regard to paper money issues is but another illustration of the remarkable grasp the people had upon sound financial principles, and the untiring energy with which they applied them to the conditions of the time.

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<sup>1</sup> By May, 1740, this paper currency had become so depreciated that it required twenty-eight shillings of it to buy an ounce of silver. "The remedy was sought in the same direction whence the evil had come, to wit: in novel legislation, and new emissions of paper, on the principle *similia similibus curantur*." Consequently, May, 1740, the Assembly ordered that £30,000 should be emitted, in value from one shilling to three pounds, receivable "in all payments, and in the Treasury." This issue was called "new tenor," in contradistinction to preceding issues, which were called "old tenor." Later, the legal-tender provision was struck out in obedience to a demand of the Board of Trade. Conn. Col. Rec., VIII., 319; Bronson, 56-8; Johnston, 256.

<sup>2</sup> Palfrey, "History of New England," III., 362, 379, 381; IV., 230, 482; V., 193; Trumbull, "History of Connecticut," I., 450; II., 46, 49, 266, 457; Douglass, "Summary of America," II., 178, 180. Compare the condition in Rhode Island (Douglass, I., 202).



## CHAPTER V.

### COLLECTION OF TAXES.

#### *The Constable.*

To this official, "armed, like his English prototype, with very large powers of arresting and impressing, of breaking open houses and the like,"<sup>1</sup> fell the duty of collecting the tax. Such powers would be very necessary in levying distress and making arrests, and it was on this account that he was selected by the English to gather the public revenue, and probably for like reason he naturally became the collector of the colony tax.<sup>2</sup> This officer, with his functions, was transplanted to Massachusetts,<sup>3</sup> and thence to Connecticut,<sup>4</sup> where from the very beginning of governmental organization throughout the whole period, he continued to be the collector of the commonwealth tax.<sup>5</sup> His duties were

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<sup>1</sup> Blackstone, "Commentaries," I., 356.

<sup>2</sup> As to the other functions of the New England constable, consult Prof. H. B. Adams, "Norman Constables in America," J. H. U. Studies in Hist. and Pol. Science, First Series, VIII., 28-30.

<sup>3</sup> Douglas, "Financial History of Massachusetts," 22.

<sup>4</sup> In the autumn of 1635 the Massachusetts Court temporarily appointed a constable for the three towns upon the Connecticut—a legal recognition of equality (Prof. C. M. Andrews, "The River Towns of Connecticut," 23). The constable was the link between commonwealth and town, and his appointment was the recognition of the town as such (Johnston, "History of Connecticut," 78).

<sup>5</sup> A close examination of the records will show that the constable from the first, collected the colony rate in addition to his other manifold duties. April 26, 1636, at the first session of the Court, a constable was sworn for each of the three towns "for this next yeere and vntill newe be chosen" (Conn. Col. Rec., I., 1). On the following November, Sergeant Strickland and others were granted pay for certain services to the colony, and it was ordered by the court "y<sup>t</sup> the constable shall make a rate to that purpose" (ibid., 6). This conclusively shows that the constables were, in the first year of the colony, accustomed to gather rates, and that this

at first largely military, but after the Pequot War, he gradually lost his military character and became the civil officer outlined in the Code of 1650.<sup>1</sup> By this law, constables were

rate was placed in their hands as the natural officers to collect it. But further: February 9, 1637, just at the time when the term of office of the old constables was up, according to the order of the Court, Mr. Clement Chaplin was appointed treasurer to collect the rates that should be levied by the Court; and four under-collectors were appointed, one for each town. Of these collectors, Mr. Henry Wolcott was one of the constables sworn the year before. At the re-election of the town officers in the winter of 1637 it is probable that he was the only constable re-elected; and furthermore, we know that the constable for Agawam (Springfield) was first appointed this year. Just below the names of the under-collectors of the colony rate, the name of constable not having been mentioned, the records read: "They [certain military utensils] are to be delivered into the hands of the saide Constables of the said townes, and the said Constables," etc.; the names of the four towns had just been mentioned in connection with the under-collectors (*ibid.*, 12). December 1, 1642, we have a direct statement that the constables collected the rate at that date: a rate of £50 was voted, and the produce and the values of each at which they were to be received by the constables in payment of the rate stated, "and the Constables of ech Towne are Ordered to receaue no other but at such vnder Rate as they shall esteeme yt at," etc. (*ibid.*, 79). The constable gathered the colony rate in the town of Hartford as early as January 22, 1644 (Hartford Town Records, I., 43). December 6, 1648, the constables gathered the "fort rate" (Conn. Col. Rec., I., 170). The text of the Code of Laws, 1650, shows that the constable had been accustomed to gather the rates before the code was compiled: "Whereas much wrong hath beene done to the Country by the negligence of Constables, in not gathering such Leuyes as they haue receiued Warrants from the Treasurer, during theire office," etc. (*ibid.*, 550). On account of the powers of the constable, it is likely that when the Court appointed under-collectors, February 9, 1637, it simply appointed the constables who had just been chosen by the towns.

<sup>1</sup>In the New Haven colony the marshal corresponded to the constable. He was first chosen for the town of New Haven, October 25, 1639 (New Haven Col. Rec. I., 21). Besides his military duties he also collected the jurisdiction rates (*ibid.*, II., 601). Usually he was chosen by the Court in October, but after 1648 in May (*ibid.*, II., 381). A marshal for the whole jurisdiction was chosen by the Court for the first time, October 26, 1643. At the union with Connecticut, two constables were chosen, though the service of a marshal was continued until 1670 (Levermore, "The Republic of New Haven," 157).

chosen annually before the first of March, by the towns, at their town meetings, and took the oath of office before a magistrate or at the next session of the General Court.<sup>1</sup> During the administration of Andros, all town officers were chosen on the third Monday in May, and the constables were sworn to a faithful discharge of their duties at the next Court of Sessions of their respective counties.<sup>2</sup> After the resumption of charter government, by a special act of the General Court, the time of election of town officers was made to occur uniformly in December.<sup>3</sup> In case of death or the removal of a constable, the town was required to elect another immediately.<sup>4</sup> October, 1721, the town clerks were required to send in to the General Court, some time during May, the names of the constables chosen by their towns.<sup>5</sup>

The Court having voted a rate, the treasurer, shortly after the second Thursday in September (and in any case at least three months before the time specified for its collection),<sup>6</sup> notified the constables to proceed to levy it.<sup>7</sup> The consta-

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<sup>1</sup> Conn. Col. Rec., I., 522.

<sup>2</sup> By an order in Council, January, 1687, Andros directed the late treasurer of the colony, Mr. Joseph Whitney, with three others, to look after the financial affairs of Connecticut. The treasurer was to direct his warrants to the constables to collect the rates, and keep a strict account of funds received and disbursed (*ibid.*, III., 401, 407, 429). The law regarding rates was enacted March 3, 1686 (*ibid.*, 407).

<sup>3</sup> "Voted that the annual Town Meeting required by law to be held by the inhabitants of each town in this Colony some time in the month of December for the election of town officers and for managing the affairs of the town shall be in future held on the third Tuesday in December annually." Hartford Town Records, I., 300.

<sup>4</sup> Enacted May, 1694. Conn. Col. Rec., IV., 124.

<sup>5</sup> *Ibid.*, VI., 280, 501.

<sup>6</sup> Enacted October, 1756, because of misunderstandings between the treasurer and constables (*ibid.*, X., 561). During the administration of Andros, constables were required to return the rates to the treasurer before the 20th of November (*ibid.*, III., 407), and arrange their accounts with the treasurer by the first of May (*ibid.*, 408).

<sup>7</sup> New Haven first elected a treasurer with similar powers, May, 1641. New Haven Col. Rec., I., 51.

bles then gave reasonable warning to the inhabitants to pay their taxes upon a certain day.<sup>1</sup>

Constables were required to make payment of the rate to the treasurer by the last of June.<sup>2</sup> It was found quite difficult to do this because the constables were restricted to their own towns in their powers of collecting the rate, while many persons owned estates in different parts of the colony, and others moved from place to place after having been listed.<sup>3</sup> This fault was remedied October, 1719, when the constables and other collectors of rates were given the same jurisdiction throughout the colony that they possessed in their own districts.<sup>4</sup> Even with these powers, the constables often found it difficult to collect the rates and were then compelled to exercise the power of distress.<sup>5</sup> Any time within two months of the date on which the tax was to be returned to the treasurer, the constable by a warrant from either an assistant or magistrate, could collect the tax from a delinquent person by the process of distress.<sup>6</sup> A well-established order of distress was observed, from the seizure of mere movables to the arrest and imprisonment of the

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<sup>1</sup> Conn. Col. Rec., I., 113, 551.

<sup>2</sup> From March, 1662(3), to October, 1708, constables delivered the rates at the Quarter Court in June (*ibid.*, 393). The constables of Fairfield county made payment by the first week in June, and those of New Haven, New London and Hartford counties by the end of the second, third and fourth weeks respectively (*ibid.*, V., 85).

<sup>3</sup> Conn. Col. Rec., VI., 154.

<sup>4</sup> *Ibid.*, 280.

<sup>5</sup> *Ibid.*, I., 550. The exercise of this power in New Haven hurried on the union with Connecticut. The reception of the charter, 1662, placed the New Haven colony in a very embarrassing position. It was much in debt, and taxes had been spasmodically collected. Many of the inhabitants were disaffected and refused to pay their taxes, and when recourse was had to distress they fled to Connecticut, where they received prompt protection. December 13, 1664, the New Haven colony ceased to exist, and the dissensions came to an end. Trumbull, "History of Connecticut," I., 263; Levermore, "The Republic of New Haven."

<sup>6</sup> Conn. Col. Rec., I., 336; X., 561.



person.<sup>1</sup> Although a constable's term of office had expired, he still had the authority to distress for taxes in arrears during his incumbency, and if he died during his term of office<sup>2</sup> his administrators were given the same powers that he had possessed.<sup>3</sup> The functions of the constable were not changed by the usurpation of Andros, and in Connecticut there was a notable absence of the resistance to the collection of the tax that characterized Massachusetts during the same period.<sup>4</sup>

Constables were held responsible for the collection of the rates,<sup>5</sup> and unless they returned them by the time specified by law, their property was levied upon by the treasurer, who in turn, was responsible to the General Court for all deficiencies.<sup>6</sup> In disputes between the treasurer and con-

<sup>1</sup> 1. Goods or cattle. Such goods were sold at public auction for the specie in which the rate was to have been paid (Conn. Col. Rec., I., 336; II., 242; Trumbull, "History of Connecticut," I., 262). In New Haven and Connecticut a man's household necessities, apparel, tools and arms were exempted (Conn. Col. Rec., I., 537; New Haven Col. Rec., II., 601). The costs of distress were added to the rate.

2. Houses or lands. Such lands were sold at public auction and a good title given to the purchaser (Conn. Col. Rec., V., 327). Cf. New Haven Col. Rec., II., 551, 601.

3. Seizure of person. Before the man's person could be seized, the constable was required to satisfy the treasurer that there was no property to be taken, after which a warrant was issued empowering the constable to imprison the delinquent person until the next Court, unless he gave bail or paid the tax (Conn. Col. Rec., I., 550; IV., 61, 100. Cf. New Haven Col. Rec., II., 601). In case of resistance, violence was not used to the shedding of blood except in self-defense. Distress in any case could not be executed before the July succeeding the levy of the rate (Conn. Col. Rec., V., 183), and rates so collected were returned to the treasurer by August 31.

<sup>2</sup> Conn. Col. Rec., I., 550; V., 21.

<sup>3</sup> Ibid., VII., 306, 440.

<sup>4</sup> Several towns in Massachusetts (all but three in Essex county) refused to submit to the law of Andros. Several arrests were made and fines laid, after which the people saw the policy of Connecticut was the wiser one. Palfrey, "History of New England," III., 524 ff.; John Palmer, "Andros Tracts," I., 80; Trumbull, "History of Connecticut," I., 373.

<sup>5</sup> Conn. Col. Rec., I., 113.

<sup>6</sup> Ibid., V., 123; X., 402.

stables, the General Court was the final arbiter.<sup>1</sup> When the property of constables was seized and found inadequate to supply the arrearage, the sheriff<sup>2</sup> levied execution upon the property of the selectmen or of any individuals of the town who, upon petition to the General Court, received authority to recover damages from the town at large.<sup>3</sup> Prior to May, 1714, there was no law of procedure in case a constable became insolvent.<sup>4</sup> Quite a number of defalcations had occurred, and it was found necessary to legislate upon the matter.<sup>5</sup> When the constable became insolvent, the sheriff collected the amount from the selectmen who were given authority to levy a rate upon the town sufficient to cover the amount with costs.<sup>6</sup>

#### *Abatement—Discount.*

Poor people and persons overcharged in the lists were granted abatement of taxes, either in whole or in part. In the former case, the power of granting such abatement was vested in the majority of the selectmen with the consent of an assistant or a justice of the peace, and the amount was paid by the town.<sup>7</sup>

An important act was passed, February, 1757, introducing a custom which practically amounted to a discount upon taxes paid in advance. The French and Indian War was being waged, and the colony was in need of immediate funds to send out an expedition. The rate granted for carry-

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<sup>1</sup> Ibid., IV., 409.

<sup>2</sup> The treasurer at first found it very difficult to proceed against the constable, because there was no officer delegated by law to levy such executions. This power was given to the sheriff, May, 1713 (ibid., V., 380, 475; VII., 386). Within thirty days, that officer levied the execution, and within the next sixty days, reported what had been done; if nothing, then the selectmen were levied upon (ibid., X., 561).

<sup>3</sup> Ibid., I., 551. Bronson, "Early Government of Connecticut," New Haven Historical Soc. Papers, III., 352.

<sup>4</sup> Conn. Col. Rec., V., 441.

<sup>5</sup> Conn. Col. Rec., XIII., 94.

<sup>6</sup> Ibid., V., 441; VII., 440; XII., 464.

<sup>7</sup> Ibid., XII., 35, 355.

ing on the war was not payable until the last of the year, but, as the Court declared, it was apprehended that there were many rich and wealthy persons in the colony who, to advance the public interest, would readily pay the tax at once upon application. Those who were inclined to do this, were allowed five per cent. for all money advanced, from the time of payment to the last of December, at which time their taxes were due.<sup>1</sup> The law of May, 1767, naturally followed, by which interest was charged for all overdue taxes.<sup>2</sup> Three years later a committee was appointed to straighten out the monetary affairs of the colony, but there is no record of any change introduced; it was probably a mere auditing committee.<sup>3</sup>

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<sup>1</sup> Conn. Col. Rec., X., 603.

<sup>2</sup> Ibid., XII., 561.

<sup>3</sup> Ibid., XIII., 128, 187, 301.

## CHAPTER V.

### INDIRECT TAXATION.

Indirect taxation in colonial Connecticut, developed rather late and never became a vital part of the system of taxation. As in Massachusetts, indirect taxes were introduced to lighten the burden of the tax upon polls and estates.<sup>1</sup> This order of development was the reverse of that in New York, where the general property tax was introduced to ease the burden of indirect taxation.<sup>2</sup> Strictly speaking, there was no system of indirect taxation in Connecticut—the laws relating to the excise and impost were scattered and without any element of uniformity. The duties of the officials concerned in the collection of the tax were often ill-defined, due, to a certain extent, no doubt, to the fact that there was no separate administrative organization. The administration of the tax was placed in the hands of existing officials, and in some instances the collection of both excise and impost was intrusted to the same individual. As in the case of direct taxation, the principles of indirect taxation were taken from Massachusetts.<sup>3</sup>

#### *Excises.*

It is evident that as early as April, 1638, there was a tax upon the beaver trade,<sup>4</sup> and by January, 1646, a tax upon wine.<sup>5</sup> The excise duties prescribed by Andros were

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<sup>1</sup> Douglas, "The Financial History of Massachusetts," 32.

<sup>2</sup> Schwab, "History of the New York Property Tax," 22 *et seq.*

<sup>3</sup> Palfrey, "History of New England," III., 60.

<sup>4</sup> "It is ordered there shalbe 1s pr skin of beaver to be payde to the publicke out of the Trade of beaver." Conn. Col. Rec., I., 20, 31, 161. Cf. Plymouth Rec., II., 103.

<sup>5</sup> *Ibid.*, 262. The laws of New Haven, 1656, first provided for an excise upon liquors and wine; 8d for every gallon of liquor retailed,



on the manufacture and sale of liquors, and were specific.<sup>1</sup> To discourage the importation and sale of foreign liquors, May, 1735, an excise of six pence per gallon was laid upon all such liquors retailed.<sup>2</sup> By an act of October, 1755, which was in many respects a re-enactment of the Andros specifications, all distilled liquors sold in less quantities than thirty gallons paid an excise of four pence per gallon.<sup>3</sup>

Licenses were early required for liberty to sell intoxicating liquors and privilege to keep taverns, but there are few instances where they were not free of cost.<sup>4</sup> A stated revenue was first derived from the issuance of licenses, October, 1717, when pedlers were required to take out licenses at the first town in which they exhibited their goods, and for which they paid twenty shillings for every hundred pounds worth of goods.<sup>5</sup> May, 1757, the payment for the license was made a fixed sum, and the license was granted by the judge of the county court. By an act of October, 1770, an attempt was made to favor home industries at the expense of imported goods. All peddling was suppressed,

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and 40s for every butt or pipe of wine. New Haven Col. Rec., II., 214, 592, 596. Cf. Conn. Col. Rec., I., 146, 262; Mass. Code, 1672, 82-3.

<sup>1</sup> For every butt or pipe of wine retailed, 50s; for every quart of brandy, rum, etc., 2d; for every hhd. of cider, ale or beer, 2s 6d; and so proportionally for a greater or lesser quantity (Conn. Col. Rec., III., 409, 443). It was found that the revenue thus received was very small, and an attempt was made by Andros to increase it by the "Additional Act" of February 15, 1687, when the excise upon wine was made 1s per gallon; brandy, rum, etc., increased by 4d per gallon; and beer, ale, and cider increased by 1s 3d per barrel (*ibid.*, 433).

<sup>2</sup> *Ibid.*, VII., 562, 565.

<sup>3</sup> Conn. Col. Rec., X., 409, 452. Cf. New Haven Col. Rec., II., 146. Douglass makes it 3d per gallon on all wine and distilled liquors. "Summary of America," II., 178.

<sup>4</sup> The following would hardly be counted an exception: October, 1664, the General Court granted "Sam<sup>l</sup> Gibbs a lycense" to sell wine, for which privilege he was to present "the Court w<sup>th</sup> an anchor of the best of his wine, which the Court desires him to leaue w<sup>th</sup> the Gouvernour." Conn. Col. Rec., I., 434.

<sup>5</sup> This certificate they were compelled to show on demand. *Ibid.*, VI., 24.

with certain exceptions, but the licenses already granted were to run until the end of the period for which they were issued.<sup>1</sup>

It was not until the administration of Andros that anything approximating a system of excise appeared. The treasurer from the very first had been designated to administer the excise laws and receive the revenue;<sup>2</sup> to him, or others appointed for the purpose, retailers of liquors were required to pay the excise on the reception of their goods.<sup>3</sup> By the act of May, 1698, the Governor appointed one collector of the excise for each county,<sup>4</sup> but May, 1708, the power of appointing and dismissing was given to the county court.<sup>5</sup> Each collector had general management of the excise in his county, and on demand made a report to the colonial treasurer. Later, May, 1712, the treasurer could demand a report quarterly.<sup>6</sup> Moreover, because of the indebtedness of the counties and the expense of the grand jurors, all excise was handed over to the county treasurers for the use of the counties.<sup>7</sup> A still further differentiation took place May, 1735, when the townsmen appointed to nominate retailers of liquor, were also required to appoint a commissioner of excise to collect the town revenue, which was at the same time diverted to the town's use.<sup>8</sup> October, 1755, this commissioner or collector was required to be

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<sup>1</sup> Except that of deer skins, beaver furs and all other produce and manufacture of this and neighboring colonies. *Ibid.*, XIII., 364; Douglass, "Summary of America," II., 175.

<sup>2</sup> The first tax on beaver was ordered to be "paide into the Treasury every half yeere" (*Conn. Col. Rec.*, I., 20, 31). In New Haven, payment was made to the treasurer within three months. *New Haven Col. Rec.*, II., 217, 592, 596.

<sup>3</sup> Collectors were given authority to search for liquors and to gauge casks and make seizure. By agreement, retailers were allowed to pay the excise annually or quarterly without making entry.

<sup>4</sup> *Conn. Col. Rec.*, IV., 262. <sup>5</sup> *Ibid.*, V., 518. <sup>6</sup> *Ibid.*, V., 319.

<sup>7</sup> "An Act for settling the Money collected for the Excise on the Treasury of the several Counties." *Ibid.*, 320.

<sup>8</sup> *Conn. Col. Rec.*, VII., 562.

appointed by each town at its annual meeting in December.<sup>1</sup> These collectors made payment to the colonial treasurer by the first of May succeeding their election.<sup>2</sup> Each town was responsible for the good conduct of its collector and saw that he gave sufficient security.<sup>3</sup> The clerk of each town, by an act of October, 1763, was required to certify to the colonial treasurer the name of each collector before the 21st of March.<sup>4</sup> The excise on liquors was frequently "farmed out" in New Haven,<sup>5</sup> and a committee was appointed to consider the advisability of introducing the custom into Connecticut, but no further action was taken in the matter.<sup>6</sup>

### *Imposts.*

The legislation of the colonial period relating to impost is so empirical that an analysis upon which to base a systematic study is almost impossible.<sup>7</sup> Therefore, as was done in the consideration of the excise, it will be necessary to adopt a more chronological method of consideration than would otherwise be permissible were the laws relating to impost duties less arbitrary. The first duty levied was upon exports, but as it was laid temporarily and for a special purpose, and forms almost an isolated case, it demands but slight consideration.<sup>8</sup> The first duty upon imported liquors was laid April, 1654, but it was laid more to prohibit the

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<sup>1</sup> Ibid., X., 409. <sup>2</sup> Ibid., X., 498. <sup>3</sup> Ibid., XI., 13. <sup>4</sup> Ibid., XII., 191.

<sup>5</sup> On the payment of £20 a year, the revenues from the excise were given to an individual, but with the understanding that he was not to sublet it. New Haven Col. Rec., II., 233, 405, 452, 490.

<sup>6</sup> May, 1762, the Assembly appointed Thomas Fitch to prepare a bill for "laying, regulating and farming out an excise on spiritous liquors," and to make report at the next session. There is no record that a report was made. Conn. Col. Rec., XII., 67.

<sup>7</sup> Compare with the condition in Massachusetts. Douglas, "Financial History of Massachusetts," 32.

<sup>8</sup> The purchase of the fort at the mouth of the river from Mr. Fenwick in 1644 involved the colony in a quarrel with Massachusetts. The debt was met largely by a duty upon products ex-

importation of such goods than to produce a revenue.<sup>1</sup> Under Andros a duty was laid upon all liquors imported, and the rates were greatly increased. Liquors landed for transportation, or brought from the countries where produced, were usually exempted from payment of the impost.<sup>2</sup> By a later act, October, 1708, the exemption was extended to liquors imported in Connecticut bottoms.<sup>3</sup> There was probably a custom duty upon tobacco prior to May, 1662, but the first recorded duty is on that date.<sup>4</sup> In 1687 all merchandise imported was rated as property or land, that is, one penny on the pound; this was changed in 1696 to a duty of two per cent. of the value of the goods.<sup>5</sup> May,

ported. Officers were stationed at Hartford, Windsor and Wethersfield, to give clearances, and power was given the fort to "make stay" of vessels which did not produce clearances. Springfield objected to the duty, and the matter was carried to the Commissioners of the United Colonies for settlement, who decided in favor of Connecticut (Conn. Col. Rec., I., 119, 120, 121, 170; II., 59; Trumbull, "History of Connecticut," I., 184, 194, 508; Palfrey, "History of New England," II., 240, 242; Hazard, II., 82-4). Massachusetts retaliated by withdrawing a law that exempted the vessels of the confederate colonies from payment of customs (Mass. Rec., II., 131; Hutchinson, I., 154, 156; Trumbull, I., 184). Later (May, 1714) a high export duty was laid upon lumber, to prevent its being shipped out of the colony in too large quantities. In times of public necessity the Governor, with the advice of the Council, prohibited the exportation of grain (Conn. Col. Rec., V., 434, 499; IX., 283, 286; Douglass, "Summary," II., 178).

<sup>1</sup> For every "anchor" of liquor, 10s; for every butt of wine, 40s; for every hhd. of wine, 20s, and for every quarter-cask, 10s (Conn. Col. Rec., I., 255). In New Haven the advisability of adopting a duty on wine was discussed at the same time that the Massachusetts system of taxation was under consideration for adoption (New Haven Col. Rec., I., 495). It was not, however, until six years later, May, 1655, that the jurisdiction of New Haven passed an impost law making wines and liquors dutiable. The law does not differ from that of Massachusetts or Connecticut, save in the mere tax (*ibid.*, II., 146, 452).

<sup>2</sup> Conn. Col. Rec., IV., 249.

<sup>3</sup> *Ibid.*, V., 84.

<sup>4</sup> 25s for every hhd., or 2d per pound. *Ibid.*, V., 380.

<sup>5</sup> *Ibid.*, IV., 167. May, 1768, it was raised to five pounds per hundred pounds worth of goods (*ibid.*, XIII., 74).



1757, for the first time in the history of the colony, a special duty was laid upon tea. It was six pence on the pound by whatever means imported.<sup>1</sup>

To collect the early impost on liquors and tobacco, custom officers were appointed at certain towns which were designated as ports of entry.<sup>2</sup> To these officials, within twenty-four hours, the importer or master of the vessel paid the duty. If he was unable to make immediate payment, he gave bonds for the amount of the goods, agreeing to pay the impost, or, within two months, to transport the goods. May, 1747, a law was enacted which required the Governor to appoint a custom officer for each county.<sup>3</sup> Later, May, 1768, the number of collectors was increased to one for each town, and the power of appointment transferred to the town, which became responsible for the correct discharge of duty by its collector.<sup>4</sup> These collectors, by warrant from an assistant or a justice of the peace, were empowered to make seizure of goods and to prosecute offenders at the county court.<sup>5</sup> By an act of March, 1775, every collector of the customs was required to give a £1000 bond or be removed by the Governor.<sup>6</sup> A year later the Governor was made head naval officer and was given authority to appoint under-collectors for New London, New

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<sup>1</sup> *Ibid.*, XI., 10.

<sup>2</sup> The towns were Windsor, Wethersfield, Fairfield, Stratford, New London, Saybrook, Middletown and Norwalk. *Conn. Col. Rec.*, I., 332. Under Andros, certain ports were specified at which all goods were entered. In the selection of these ports, Andros showed his dislike for Massachusetts, which was due, no doubt, to the open resistance in that colony to his arbitrary methods. The ports were Boston, Salem, Portsmouth, Bristol, Newport, New London, Saybrook, New Haven, Milford, Fairfield and Stamford (*Conn. Col. Rec.*, III., 434). Thus out of eleven towns selected, Massachusetts was allotted but two, while Connecticut was given six and Rhode Island as many as Massachusetts.

<sup>3</sup> *Ibid.*, IX., 283.

<sup>4</sup> December 20, 1768, the town of Hartford elected a collector in conformity with this act (*Hartford T. Rec.*, II., 223, 229).

<sup>5</sup> *Conn. Col. Rec.*, XIII., 74.

<sup>6</sup> *Ibid.*, XIV., 391.

Haven, Middletown and Norwalk. One of their most important duties was that of entering and clearing vessels.<sup>1</sup>

### *Tonnage Duties.*

The early laws of Connecticut relating to maritime affairs were taken bodily from the laws of Massachusetts.<sup>2</sup> During the period under consideration, tonnage duties and fees for entering and clearing vessels were somewhat intermittent in their application, being usually applied in time of war, or to defray the cost of building lighthouses, or constructing and maintaining forts at certain places. One of the revenue laws of Andros was a tonnage duty upon all vessels above twelve tons not owned by inhabitants of New England. The duty was twelve pence or a pound of powder per ton for every voyage, and was paid to the treasurer of the colony, or to others appointed for the purpose of receiving it.<sup>3</sup> On the resumption of charter government, this duty was continued, but under slightly modified conditions.<sup>4</sup> During King George's War, for the defense of New London, a powder rate was placed upon all vessels leaving the colony for any port between Philadelphia and Portsmouth. Vessels bound for remoter ports were charged a larger tonnage.<sup>5</sup> A similar tonnage duty was levied during the French and Indian War for maintaining a war vessel,<sup>6</sup> and again in 1760 to construct and maintain a lighthouse.<sup>7</sup>

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<sup>1</sup> Ibid., XV., 280.

<sup>2</sup> Ibid., II., 201.

<sup>3</sup> Conn. Col. Rec., III., 411.

<sup>4</sup> The minimum tonnage was made eight, and the amount of powder to be paid reduced to a quarter of a pound (raised to a half-pound, May, 1695). Those vessels entering ports for wood, water, or on account of weather, provided they left within forty-eight hours, were not subject to the tonnage payment. The duty was payable only at ports where forts were situated (ibid., IV., 129).

<sup>5</sup> Vessels over ten tons and not more than fifty, 4s; over fifty tons and not more than a hundred, 8s; more than a hundred, 12s. Vessels bound for foreign ports paid double these rates. Ibid., IX., 75.

<sup>6</sup> Ibid., XI., 10.

<sup>7</sup> Ibid., XI., 468.

## CHAPTER VI.

### LOCAL TAXATION.

In a study of local taxation in colonial Connecticut, the local division that demands our chief attention is the town. It is true there were other divisions, as the parish, the proprietorship, and the county; but, aside from the first mentioned, they demand slight consideration. The financial system of a Connecticut town, though interesting and instructive, was of a very simple character. During the first few years after the settlement of the three towns upon the river, few, if any, perplexing financial questions arose; charges of all kinds were raised by a single rate, and levied upon the inhabitants by some rough estimate of ability to pay. Bills were usually presented to the town meeting at the midwinter session, and a rate levied to pay them. Soon, however, a process of differentiation set in: first, the expense of unusual undertakings was met by special taxes; next, the minister's salary, and finally, the tax for educational purposes, were separated from the general rate.

#### *Ecclesiastical Tax.*

The first settlers of Connecticut made practically no distinction between civil and ecclesiastical affairs—to them the two were convertible terms.<sup>1</sup> The parish and township were identical even down to 1667. Civil and religious affairs were alike discussed and passed upon in the meeting-house.<sup>2</sup> Suffrage was not restricted by any ecclesiastical obligations, as in Massachusetts and New Haven, and at first the religious homogeneity of the settlers made voters and church-members practically identical. Likewise there was

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<sup>1</sup> Johnston, "History of Connecticut," 220.

<sup>2</sup> Andrews, "River Towns of Connecticut," 83.

no distinction made between the different town charges: the establishment of the town, the church and the school always went hand in hand, and every inhabitant, by the Code of Laws, 1650, was compelled to contribute towards the maintenance of each. At first the minister's salary appears to have been raised by voluntary contributions, a committee being appointed to go from house to house to ask each man what he would give.<sup>1</sup> Although this method continued until quite late in several towns, yet in general it proved unequal and insufficient.<sup>2</sup> To provide a better method, the Commissioners of the "United Colonies of New England," September 5, 1644, proposed a law which was adopted by Connecticut the following October.<sup>3</sup> It propounded that every man should state what he would voluntarily give towards the support of the minister, and if any one refused to make a reasonable contribution he was to be rated by the town authorities and the amount collected by the civil power as other taxes.<sup>4</sup> On his settlement the minister was granted a certain amount of land and a house, in addition to his salary.<sup>5</sup> At first the minister

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<sup>1</sup> This custom was practised in Windsor many years (Windsor Town Records, I., 48-9; Stiles "Ancient Windsor," 153; Guilford Town Rec., February 20, 1649(50); Andrews, "River Towns of Connecticut," 114). In Norwich an attempt was made after 1656, to raise the minister's salary by contributions. Collectors were instructed to exempt poor people (Caulkins, "History of Norwich," 125). As appears from the records, a similar attempt was made in the same town as late as April 30, 1767: "Voted to maintain the ministry not by a rate but by contributions to be taken up by the deacons in the first sabbath of every month" (*ibid.*, 288).

<sup>2</sup> Bronson, "Early Government of Connecticut," 351.

<sup>3</sup> Conn. Col. Rec., I., 112; Hazard, II., 17; Bronson, 351. It was incorporated into the Code of Laws, 1650, under the title "Ministers' Maintenance" (Conn. Col. Rec., I., 545).

<sup>4</sup> "If any man refuse to pay a meet p<sup>r</sup>portion, that then he be rated by authority in some iust & equall way; and if after this any man withould or delay due paym<sup>t</sup> the civill power to be exercised as in other iust debts." Cf. Peters, "General History of Connecticut," 59.

<sup>5</sup> One of the Fundamental Articles agreed upon at the settlement of Woodbury, February 14, 1672, is a sample of what all new towns



was supplied with firewood,<sup>1</sup> and allowed a certain number of days' work to bring his land under cultivation,<sup>2</sup> but both were soon superseded by money payments. The minister's salary was voted in a lump at the town meeting, and collected sometimes by the regular town collectors and at other times by special collectors.<sup>3</sup> The salary on the average was large, when the minister's grants and exemptions are taken into consideration. In answer to certain queries propounded by the mother country, July, 1680, the statement was made that the minister's salary was as much as £100 in some towns and nowhere less than £50 a year.<sup>4</sup>

By the Code of Laws every inhabitant was required to

did: "4ly We do further agree that y<sup>r</sup> shall be Accomodation Reserved for y<sup>e</sup> ministry besides what shall be allotted to y<sup>e</sup> first removing minister" (Woodbury T. Rec., II., 175. Cf. Stiles, "Ancient Woodbury," 39, 136; Caulkins, "Norwich," 91; Levermore, "New Haven," 166). The minister was likewise given a share of the mill tolls (Andrews, "River Towns of Connecticut," 114). Money, in lieu of land, was sometimes given.

<sup>1</sup> Each inhabitant above a certain age was required to furnish a certain amount of wood, on penalty of being fined (Simsbury T. Rec., II., 21, 55; Guilford T. Rec., Dec. 9, 1671; Norwalk T. Rec., July 17, 1695). Next, men were hired to deliver the wood (Simsbury T. Rec., II., 51, 60, 94; Norwalk T. Rec., Feb. 23, 1699). Finally the minister was granted a certain amount of money in lieu of the firewood (Simsbury T. Rec., Jan. 3, 1711(2); Norwalk T. Rec., Feb. 28, 1706(7); Windsor T. Rec., Dec. 16, 1684).

<sup>2</sup> Simsbury T. Rec., II., 28, 80.

<sup>3</sup> Hartford town-meeting voted the minister a salary, December 3, 1664 (Hartford T. Rec., I., 166, 168); Simsbury, October 2, 1695; Norwalk, 1656; Windsor, October 8, 1651 (Windsor T. Rec., I., 5); Middletown, March 14, 1660 (Conn. Col. Rec., I., 362). In Hartford (Hartford T. Rec., I., 163) and in New Haven (Levermore, 166) the deacons sometimes collected the rate; but later, special collectors were chosen (Windsor, Dec. 10, 1659; Hartford T. Rec., I., 162; Simsbury T. Rec., II., 21; Norwalk, Dec. 5, 1694). A church could settle a minister, but it required a majority of the votes of the town to provide for his salary and the collection of it. If the town failed to collect the minister's salary, the General Assembly usually ordered the constable to collect it (Conn. Col. Rec., V., 50, 186).

<sup>4</sup> Conn. Col. Rec., III., 300. Andrews, "River Towns of Connecticut," 115.

contribute to all town charges "both ciuill and ecclseastical," according to his ability.<sup>1</sup> Permission to establish an ecclesiastical society was received from the General Assembly, and was usually accompanied with exemption from colony rates for a certain number of years. Permission was received at the same time to levy taxes for the support of a minister and for building a church.<sup>2</sup> When the town decided to build or repair a meeting-house, a rate was voted and collected as a part of the town taxes.<sup>3</sup> The church at its establishment was always assigned large quantities of land which were free from taxation and not alienable.<sup>4</sup> As has been stated, previous to 1667 the township and the parish were identical, but at about that time a separation began which resulted in the transfer from the town to the ecclesiastical society of many matters relating to the church. The separation was gradual, and, in some instances, quite late in the period, meeting-houses were built and repaired by the town.<sup>5</sup> The colonists brought with them from Eng-

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<sup>1</sup> Conn. Col. Rec., I., 548. The platform of Cambridge, 1648, stated the same. Trumbull, "History of Connecticut," I., 289.

<sup>2</sup> Ibid., III., 57; V., 321; VII., 334; IX., 399; Orcutt, "History of Torrington," 16. The site of the meeting-house was determined by the county court (Conn. Col. Rec., IX., 399; Cothren, "Ancient Woodbury," 227, 240).

<sup>3</sup> Hartford T. Records, I., 44, 67, 113, 131, 133, 162; Simsbury T. Rec., II., 16; II., 134; Norwalk T. Rec., Jan. 3, 1659; Windsor T. Rec., 1639(40); Norwich T. Rec., 1668.

<sup>4</sup> Wethersfield T. Rec., March 23, 1666; Hartford T. Rec., I., 223, and I., 340; Andrews, "River Towns of Connecticut," 45; Trumbull, "History of Connecticut," II., 102-3. Church lands were not taxable ("Contributions to the Ecclesiastical History of Connecticut," 287).

<sup>5</sup> The law of May, 1697, mentions "townes, plantations, or societies" (Conn. Col. Rec., IV., 198, 200). October, 1799, the law governing the support of the ministry in a society was definitely stated (ibid., IV., 316, 381). December 19, 1707, the society in Windsor voted the minister's salary, and December 28, 1710, voted to build a new meeting-house, and after 1712 the ecclesiastical records are found with the records of the school society. The acts of October, 1717 and 1726 recognized the separation, and provided how societies should be formed (ibid., VI., 33; VII., 74). The first society

land and Massachusetts the idea of a church supported by the state, and as long as voters were church members and all agreed "closely in creed and methods," there was little friction. It was inevitable, however, that by the natural growth of the colony the original homogeneity should be destroyed and trouble result. The point of friction was, of course, the payment of taxes by the dissenting churches for the support of the establishment. It was not for a colony with the democratic principles that characterized Connecticut to suffer this to continue, and laws of an alleviating character were enacted, beginning with 1727 and ending with the abolition of all privileges to the Congregational form in 1818.<sup>1</sup>

#### *Educational Tax.*

There is nothing that emphasizes the sterling worth of the early inhabitants of Connecticut more than the great regard they had for popular education. Their civil and ecclesiastical polity made the education of the youth necessary, if for nothing but self-preservation.<sup>2</sup> The establish-

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of Norwalk took the management of ecclesiastical affairs in hand March, 1727 (Norwalk T. Rec., 121, 146). The town of Hartford ceased to conduct the affairs of church as early as December 23, 1684 (Hartford T. Rec., I., 223), while the town of Simsbury continued to legislate as late as December 17, 1722. Cf. N. E. Hist. Gen. Reg., XX., 45.

<sup>1</sup> The following is a summary of the acts of toleration in so far as they concerned taxation: May, 1708, all persons were given liberty to worship as they saw fit, but were not excused from paying taxes toward the support of the Congregational Church (Conn. Col. Rec., V., 50; Bronson, 395). May, 1727, members of the Church of England were freed from paying rates to the established church and given liberty to tax themselves (Conn. Col. Rec., VII., 106; Johnston, 236). May and October, 1729, this privilege was extended to cover the case of Quakers and Baptists (Conn. Col. Rec., VII., 237, 257). 1784, freedom granted to all religious bodies, but persons not connected with any church were compelled to pay rates to the Congregational Church. 1818, the entire divorcement of State and Church was accomplished. Cf. Palfrey, IV., 580.

<sup>2</sup> Stiles, "Ancient Windsor," 442. The titles "Children" and "Schools" of the Code of Laws, 1650, show how alive these early

ment of the church and the school usually went hand in hand in a Connecticut town,<sup>1</sup> and in many instances the schoolmaster was the assistant minister.<sup>2</sup> By the Code of Laws, 1650, when the population of a township increased to fifty householders it was required to employ a teacher to instruct the children in "Reading and wrighting." When the population reached a hundred families, a grammar school was required to be established. The method of raising the funds for the support of schools was left to the towns, but should any town fail to establish a school, it was required to contribute towards the support of the school in the neighboring town.<sup>3</sup> In the adoption of this system of common schools, Connecticut once more followed Massachusetts.<sup>4</sup>

The provision for the maintenance of schools was three-fold—at first, appropriation by the town and payment by the scholars,<sup>5</sup> and later, appropriation by the colony.<sup>6</sup> In the

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settlers were to the dependence of their religion and government upon education: "Forasmuch as the good Education of Children is of singular behoofe and benefitt to any Common wealth," etc., and "It being one chiefe project of that old deluder Sathan, to keepe men from the knowledge of the Scriptures," etc. (Conn. Col. Rec., I., 520, 554).

<sup>1</sup> We are of the opinion that to the Congregational Church more than to any other is due the introduction and the nurture of the principle of free education as one of the fundamental institutions of our body politic.

<sup>2</sup> May 28, 1656, Mr. Davis was granted £10 for "preaching and schooling" (Hartford T. Rec., I., 113). Cf. R. D. Smith, "History of Guilford," 82; Steiner's "MSS. History of Guilford"; "Contributions to the Ecclesiastical History of Connecticut," 249, 250; Cothren, "History of Ancient Woodbury," 39.

<sup>3</sup> "And if any Towne neglect the performance hereof aboue one yeare, then euery such Towne shall pay fiae pounds p<sup>r</sup> Annu to the next such Schoole, till they shall performe this order." Conn. Col. Rec., I., 555; Trumbull, I., 290.

<sup>4</sup> Palfrey, "History of New England," III., 60.

<sup>5</sup> Andrews, "River Towns of Connecticut," 115. At first, only those scholars who attended paid, and if there were any who were too poor to pay, on application, the town paid for them (Hartford T. Rec., I., 34, 91, 137, 333). Later, Dec. 30, 1701, in Norwalk, all boys between five and twelve years, whether they went to school or not, were compelled to pay (Norwalk T. Rec., 96). Cf. Simsbury T. Rec., Dec., 1711.

<sup>6</sup> The colony aided the schools in three ways: 1. By grants of



discussion of local taxation, it is the first that demands our consideration. Hartford, as early as December 6, 1642, voted £30 a year to be settled upon the school forever,<sup>1</sup> and the following April, at a town meeting, a schoolmaster was employed; it was provided that if the receipts from the scholars did not amount to £40, the deficiency should be made up from the town treasury.<sup>2</sup> February 1, 1648, a special rate of £40 was levied for the support of the school.<sup>3</sup> Owing to the mutilation of the early town records of Windsor, it cannot be said when the first school appropriation was made in that town, but it is probable that it was not far behind Hartford.<sup>4</sup> The first allusion to a town payment by Windsor towards the maintenance of a schoolmaster was February, 1656(7),<sup>5</sup> when £5 was voted for that purpose. In New Haven a free school was established, February 25, 1641, and provision made for its support from the town treasury.<sup>6</sup> At first, the freemen at their town meetings, managed the affairs of the school directly, but after a while it became customary to invest this power in regularly appointed

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land (Conn. Col. Rec., IV., 97, 402; Hartford T. Rec., I., 340; Andrews, 40). 2. Money appropriations. October, 1700, the General Assembly ordered a tax of forty shillings on every thousand pounds of estate, which was collected by the constables and divided between the towns which "maintained schools according to law" (Conn. Col. Rec., IV., 331, 375). 3. The revenues from the excise and impost were sometimes appropriated to educational purposes, Conn. Col. Rec., VII., 133; VIII., 585; IX., 596; X., 624; XI., 630. Douglass, "Summary," II., 189.

<sup>1</sup> Hartford Town Records, I., 32.

<sup>2</sup> Ibid., I., 34.

<sup>3</sup> Ibid., I., 61, 96, 110, 155; II., 80, 82. November 20, 1660, a committee was appointed to consider the advisability of establishing a free school (ibid., I., 132). April 23, 1674, children were taught free of charge (ibid., I., 177).

<sup>4</sup> Stiles, "Ancient Windsor," 443. Appropriations were made in other towns quite early: in Guilford, October 7, 1646 (Steiner, "MSS. History of Guilford"; Smith, "History of Guilford," 82); in Norwalk, May 29, 1678 (Norwalk T. Rec., 69); in Norwich, 1677 (Caulkins, "History of Norwich," 92); and in Simsbury, January 12, 1703(4) (Simsbury T. Rec., II., 78).

<sup>5</sup> Windsor T. Rec., Feb., 1656(7).

<sup>6</sup> New Haven T. Rec., I., 62.

committees, which about 1700 became a regular official board.<sup>1</sup> The school rates were usually levied in conjunction with the regular town rates and were collected by the same officials as were the latter.<sup>2</sup>

### *Other Taxes.*

Besides these regular rates there were others of an irregular character.<sup>3</sup> Probably the most important of these were the poor rate and the special taxes for the construction and repair of bridges. It is probable that from the first the care of the poor was in the hands of the selectmen, upon whose recommendation special appropriations were made.<sup>4</sup> At first the town rates were simply increased to meet this extra expense,<sup>5</sup> but later it was found necessary to levy special rates.<sup>6</sup> These rates were collected by the regular town collectors and usually handed over to the selectmen, to be disposed of at their discretion. The expense of constructing a bridge, when it connected two towns, was usually borne half and half by each, a special rate being levied to meet the cost.<sup>7</sup>

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<sup>1</sup> A committee was appointed in Hartford as early as February 15, 1655 (Hartford T. Rec., I., 110, 132, 164, 168, 183, 278). December 19, 1700, power of appointment and dismissal of the schoolmaster was given it (*ibid.*, 279). From that date it received larger powers (*ibid.*, II., 137, 140). A school committee was appointed in Simsbury, December 13, 1711 (Simsbury T. Records, II., 113).

<sup>2</sup> Hartford T. Rec., I., 137, 183, 333; Simsbury T. Rec., II., 70, 78, 79, 113; Norwalk T. Rec., 80.

<sup>3</sup> Andrews, "River Towns of Connecticut," 116.

<sup>4</sup> Hartford T. Rec., I., 121. November 9, 1702, the selectmen of Hartford were "required to look after the town poor" (*ibid.*, 290). Cf. Simsbury T. Rec., II., 41, 94.

<sup>5</sup> Hartford T. Rec., I., 124, 338; II., 166, 178; Simsbury T. Rec., II., 41, 94.

<sup>6</sup> Hartford T. Rec., II., 64, 76.

<sup>7</sup> Hartford T. Rec., I., 131; II., 58, 117, 165, 169. January 1, 1671, voted "that there shall be a bridge made over Norwalk river; the charg shall be born according to the list of estates then in being of every inhabitant in the town of Norwalk" (Norwalk T. Rec., 59).

*Machinery.*

The Code of Laws provided that all town rates should be made by the same rule as the colony rate.<sup>1</sup> The basis of the tax, the manner of listing and the method of collecting were identical with the commonwealth system of taxation. The town meeting was the legislative body of the township and had complete control of the financial affairs.<sup>2</sup> The town meetings were held at first once a month, but owing to the growth of the town they soon came to be held less frequently, the most important being those held in autumn and winter, when the rate was voted and townsmen, treasurer, listers, collectors and other officers were elected.<sup>3</sup> In its method of voting the rate, the town did not at once adopt the method first employed by the colony in 1650. It was not until 1688 that the custom of expressing the rate as so many pounds was superseded by the percentage method—levying a tax of so much on the pound, as “one penny upon the pound” and “one half penny and one farthing.”<sup>4</sup> Townsmen were chosen in Hartford as early as 1638, and soon acquired very important duties.<sup>5</sup> They were the most

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<sup>1</sup> “It is allso provided and ordered, that all Towne Rates shall bee made after the same manner and by the same rule as the Country Rate.” Conn. Col. Rec., I., 550.

<sup>2</sup> Ibid., 36. “Township meetings or assemblies may make prudential laws or orders.” Douglass, “Summary of America,” II., 176.

<sup>3</sup> About 1700, all towns were required to hold their annual town meeting for the election of officers some time in December. “December 25, 1705, voted that the annual town meeting required by law to be held in each town some time in December each year to choose selectmen and other officers and for considering the affairs and occasions of the town shall be in future held on the third Tuesday in December annually” (Hartford T. Rec., I., 300). Cf. Douglass, II., 176; Andrews, “River Towns of Connecticut,” 112; Steiner, “MSS. History of Guilford.”

<sup>4</sup> Andrews, “River Towns of Connecticut,” 114; Hartford T. Rec., II., 76, 78, 175, 206; Windsor T. Rec., February 10, 1702, and II., 58.

<sup>5</sup> Townsmen were first chosen in New Haven, November 17, 1651, that the town meetings “w<sup>ch</sup> spends the towne much time, may not

important officials in the town expenditure, and were quite frequently called upon to "make the rate,"<sup>1</sup> but they could neither levy a rate nor collect it.<sup>2</sup> The town treasurer kept an account of the rates granted and levied, and, together with the townsmen, had general direction of the tax collectors, with power to issue warrants for their arrest in case they were negligent.<sup>3</sup> Listers of estates were early chosen in conformity with the specifications laid down in the Code of Laws, 1650.<sup>4</sup> Their duties and powers were outlined by that code and have been considered in a previous chapter.<sup>5</sup> In the town of Hartford it is probable that the collection of the town rates was at first placed in the hands of the officials whom, December, 1639, the town ordered to be chosen to aid the selectmen "in such things as they appoint about the town affairs and be paid at a publicque charge."<sup>6</sup> Soon regular collectors were chosen annually for this purpose. Collectors, by warrants from the treasurer of the town, had power to levy execution upon delinquent taxpayers, and as a last resort to arrest them.<sup>7</sup> Their power was further

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be so often" (New Haven Col. Rec., II., 76). First chosen in Norwalk, April 13, 1654 (Norwalk T. Rec., 43). Prof. Andrews states (109) the "name selectmen does not appear in Hartford before 1691." From the Hartford town records it is evident the name townsmen had become changed to that of selectmen as early as December 5, 1687 (Hartford T. Rec., I., 233).

<sup>1</sup> Hartford T. Rec., I., 94, 300; II., 184, 217; Simsbury T. Rec., Feb., 1735. December 12, 1770, the Hartford selectmen were given authority to make abatements in taxes when it was evident that persons were overcharged (Hartford T. Rec., II., 235). Steiner's "MSS. History of Guilford."

<sup>2</sup> Hartford T. Rec., I., 57; Andrews, "River Towns of Connecticut," 108; Stiles, "Ancient Windsor," 57.

<sup>3</sup> Hartford T. Rec., I., 344; II., 45; Simsbury T. Rec., II., 18, 79.

<sup>4</sup> Hartford T. Rec., I., 131 (Jan. 14, 1660). In Hartford as many as six were elected. Cf. Andrews, "River Towns of Connecticut," 101; Stiles, "Ancient Windsor," 62; Steiner's "MSS. History of Guilford."

<sup>5</sup> *Infra*.

<sup>6</sup> Hartford T. Rec., Dec. 23, 1639; Andrews, 95.

<sup>7</sup> Hartford T. Rec., II., 57; Steiner, "MSS. History of Guilford."



increased, May, 1728, when they were given the power of sheriffs and constables in the execution of their offices.<sup>1</sup> This extension of power was probably due to the difficulty that the local tax collectors had experienced heretofore in collecting rates by the process of distress.

Counties were established May, 1666.<sup>2</sup> When it became necessary for a county to levy a tax to build a jail or a court-house, the county court levied the tax, and the constables, at first, by warrant from the county treasurer, collected it.<sup>3</sup> The method of collecting the tax was changed somewhat, May, 1753, when the county court was given authority to appoint county collectors, who were given the same authority and were made subject to the same regulations as other collectors of rates.<sup>4</sup> The following October it was enacted that before the county court could levy a tax for building a jail or court-house, the consent of the major part of the assistants and the justices of the peace was to be had.<sup>5</sup> Those proprietorships not constituted into townships had authority to levy taxes and to appoint collectors and rate-makers as occasion demanded.<sup>6</sup>

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<sup>1</sup> Conn. Col. Rec., VII., 173.

<sup>2</sup> Ibid., II., 34.

<sup>3</sup> Ibid., IV., 361; VI., 158.

<sup>4</sup> Ibid., X., 160.

<sup>5</sup> Ibid., 206.

<sup>6</sup> Like the county collectors, these collectors were given the same powers and governed by the same regulations as other collectors of rates. Ibid., VII., 379-380. Douglass, "Summary of America," II., 177; Andrews, "River Towns of Connecticut," 66.

## APPENDIX.

GRAND LISTS AND LISTS OF NINE REPRESENTATIVE TOWNS.<sup>1</sup>

Date.	HARTFORD.	WETHERS-FIELD.	WINDSOR.	MIDDLE-TOWN.	NEW LONDON.	NEW HAVEN.	GUILFORD.	MILFORD.	SIMSBURY.	GRAND LISTS OF THE COLONY.
	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
Oct. 1651	22,404 19	12,748 ..	15,435 ..	.....	.....	.....	.....	.....	.....	75,492 10 16
1652	19,733 19	11,499 ..	14,093 ..	.....	.....	.....	.....	.....	.....	70,011 13 ..
Sept. 1653	19,749 ..	12,243 ..	15,084 ..	.....	.....	.....	.....	.....	.....	79,576 19 ..
1654	19,609 ..	12,602 ..	15,833 ..	2,173 ..	.....	.....	.....	.....	.....	79,074 ..
Oct. 1655	19,525 ..	12,404 ..	15,595 ..	2,315 ..	.....	.....	.....	.....	.....	73,170 08 ..
1658	20,547 ..	12,397 ..	16,209 ..	2,326 ..	5,793 04 ..	17,703 10 ..	7,315 ..	9,600 ..	.....	85,488 17 ..
1665	17,734 ..	11,847 11	15,812 ..	3,719 10	9,059 02 ..	16,140 10 ..	6,726 11	9,994 15	.....	153,620 16 05
1670	17,028 05	11,510 ..	13,545 ..	3,915 ..	8,506 15 ..	13,550 ..	6,338 06	8,836 05	.....	145,778 01 ..
1675	15,462 ..	11,359 ..	13,481 ..	4,818 ..	9,572 ..	14,284 ..	6,214 ..	8,906 ..	.....	147,940 02 ..
1680	17,188 ..	11,928 ..	14,353 ..	5,018 ..	9,818 ..	.....	.....	.....	.....	136,298 ..
1685	17,162 ..	13,215 ..	14,678 ..	5,599 ..	11,186 ..	15,428 ..	6,220 ..	9,685 ..	.....	168,707 ..
1689	19,112 ..	13,992 ..	14,953 ..	5,468 ..	8,583 ..	16,286 ..	7,000 ..	9,856 ..	3,606 ..	172,820 ..
1695	17,936 ..	11,468 ..	15,652 ..	5,448 ..	10,138 ..	13,101 ..	7,529 ..	9,046 ..	2,604 ..	180,858 ..
1700	17,844 ..	11,373 ..	15,726 ..	6,743 ..	8,722 19	16,769 ..	7,951 ..	10,775 ..	2,984 ..	198,531 19 ..
1705	20,010 ..	13,534 ..	16,352 ..	8,417 ..	8,769 ..	19,128 ..	10,031 ..	12,028 ..	3,776 ..	245,963 15 ..
1710	18,879 15	15,363 12	14,608 07	9,517 18	10,351 15	18,339 04	11,645 05	13,248 03	4,249 07	281,639 13 06
1715	20,697 01	14,739 03 06	15,973 06 06	11,909 09	10,740 15	22,159 04 02½	13,577 19 01	13,047 06 05	4,509 13 06	327,394 08 07½
1720	23,723 01	19,060 14 06	18,114 17 ..	14,341 19 07	15,730 16 02	29,074 02 10	16,362 01 13	18,334 05 01	7,100 02 06	432,990 11 11
1725	24,784 11	16,19,384	20,923 05 ..	17,704 05 03	17,643 15 ..	33,145 06 10	20,910 16 01	23,333 05 02	8,339 ..	543,018 05 11
1730	27,959 02	16,400 16 04	24,637 06 ..	22,323 03 ..	18,965 06 06	36,903 04 11	20,958 03 07	22,836 03 07	9,922 07 ..	640,719 13 09
1735	32,962 02	22,365 19 03	26,882 ..	27,201 15 ..	24,131 ..	41,750 06 01	25,678 06 02	24,772 04 ¾	10,686 11 06	759,877 04 04½
1740	31,772 07	23,849 04 03	31,097 ..	33,290 05 ..	27,903 16 ..	43,828 01 06	27,939 08 ..	25,099 .. 07	13,888 15 ..	979,286 02 ....
1745	35,579 04	25,185 09 04	33,407 13 11	38,205 03 ..	33,220 03 03	47,633 09 ..	34,460 08 06½	25,398 16 01	16,053 03 ..	1,013,839 10 08
1750	38,725 04	29,378 03 ..	39,611 18 06	48,456 12 ..	30,227 01 07	55,632 03 06½	33,677 .. 05	28,950 11 05½	19,536 04 ..	1,267,415 19 ....
1755	39,227 13	27,553 02 07½	42,369 07 ..	50,251 11 ..	35,761 07 ..	58,536 05 09½	35,217 14 09	28,657 11 06	21,526 ..	1,317,560 14 04½
1760	38,381 05	27,992 05 05	42,021 04 02	49,556 08 08	34,753 04 08	57,188 09 09	31,766 .. 10	26,464 14 08	23,311 18 ..	1,472,997 19 02
1765	39,732 09	29,978 18 09	42,811 04 02	56,276 01 ..	36,574 05 03	67,640 03 03	33,096 12 10¾	28,599 03 10	24,137 05 ..	1,576,805 10 09½
1770	44,159 11	31,939 01 04	24,455 13 03	41,108 02 ..	36,724 12 06	68,338 14 05	34,355 15 06	29,538 14 07	28,835 04 ..	1,781,135 02 06½
Dec. 1775	51,253 11	34,158 16 07½	24,993 06 07	45,055 03 04	35,685 01 03	73,712 04 06	35,544 11 07½	30,019 06 09	36,601 06 ..	1,975,275 03 09

<sup>1</sup> This table shows the Grand List and the individual assessments of nine representative towns from 1651 to 1775. One is impressed by the fact that not only is the rate of increase very small, but the amount of wealth represented is much smaller than would naturally be expected. This was due to the method of entering estates in the lists according to the probable income rather than the true value. Some of the fluctuations in the town lists were due to the fact that property omitted from the lists in the first place were "fourfolded." The Grand List, with one exception (1670), shows a small but steady increase. This one exception was probably due to the fact that assessments in the New Haven jurisdiction were more exact. From 1655 to 1680, New Haven, Guilford, and Milford show a steady decrease. Prior to the



**IX-X**

**A STUDY OF SLAVERY IN NEW JERSEY**





JOHNS HOPKINS UNIVERSITY STUDIES  
IN  
HISTORICAL AND POLITICAL SCIENCE

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History is past Politics and Politics are present History—*Freeman*

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FOURTEENTH SERIES

IX-X

A STUDY OF SLAVERY IN NEW JERSEY

By HENRY SCOFIELD COOLEY

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# CONTENTS.

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	PAGE
INTRODUCTION.....	7
THE INCREASE AND DECLINE OF SLAVERY.	
The Proprietary Colony.....	9
Indian Slavery.....	11
The Royal Governors.....	13
The Slave Trade.....	14
The Anti-Slavery Movement..	20
The Extent of Slavery.....	30
THE GOVERNMENT OF SLAVES.	
Regulations Concerning Truant or Fugitive Slaves.....	32
Other Police Regulations.....	35
The Criminal Law for Slaves.....	37
Negro Plots.....	42
THE LEGAL AND SOCIAL POSITION OF THE NEGRO.	
Manumission.....	45
Rights and Privileges of Slaves and Free Negroes.....	50
Social Condition of Slaves.....	55
BIBLIOGRAPHY .....	59





## INTRODUCTION.

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An accurate and thorough knowledge of slavery as it developed in the United States can best be gained by a comparative study of the institution as it has existed in the various States. Preparatory to such a study, the experience of each of these commonwealths needs to be investigated separately. This has been done in several instances very satisfactorily. The writer has aimed to follow lines of investigation already opened, and has pursued the history of slavery in New Jersey, his native State.

New Jersey history is conveniently studied in three periods: the period of the Proprietary Colony, 1664–1702; the period of the Province of the Crown, 1702–1776; and the period of the State. These divisions have not been adopted in the plan of this monograph, an arrangement by subject appearing more desirable; but it is hoped that they have been sufficiently recognized throughout the paper. In general, in the Proprietary Colony we find the early beginnings of slavery; in the royal Colony, a steady increase in the number of slaves, and special forms of trial and punishment for slaves prescribed in the criminal law. This was also the period of a strong abolition movement among the Friends, ending in 1776 with the denial by Friends of the right of membership in their Society to slaveholders. In the State the anti-slavery movement, largely under the leadership of the abolition societies, grew to greater and greater strength. Its influence showed itself in practical ways in the support given to negroes before the courts, in the extinction of the slave trade, and in the passage of the gradual abolition law of 1804.

The writer takes this opportunity to express his thanks for many courtesies received in the use of the New Jersey State Library at

Trenton, the New York Historical Society Library and the Lenox Library at New York, the Bergen County Records at Hackensack, and particularly to F.W. Ricord, Esq., Librarian of the New Jersey Historical Society, for full and free access to its collections. The writer wishes also to recognize most gratefully his obligation, to Dr. Bernard C. Steiner for many valuable suggestions as to the method of investigation, and to Dr. Jeffrey R. Brackett for very helpful criticism of the manuscript.

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# A STUDY OF SLAVERY IN NEW JERSEY.

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## CHAPTER I.

### THE INCREASE AND DECLINE OF SLAVERY.

In nearly all of the English Colonies in America the institution of slavery was recognized and accepted by both government and colonists from the earliest period of settlement. In New Jersey the relation of master and slave had legal recognition at the very beginning of the Colony's political existence. The earliest constitution, the "Concessions"<sup>1</sup> from Lord Berkeley and Sir George Carteret in 1664, specifies slaves as possible members of the settler's family.

By the "Concessions" the Lords Proprietors granted to every colonist that should go out with the first governor seventy-five acres of land for every slave, to every settler before January 1, 1665, sixty acres for every slave, to every settler in the year following forty-five acres for every slave, and to every settler in the third year thirty acres for every slave. For the colonist's own person and for every able-bodied servant other portions of land were given, and all, according to the text of the instrument, "that the planting of

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<sup>1</sup>"The concessions and agreement of the Lords Proprietors of the province of New-Caesarea or New Jersey, to and with all and every of the adventurers, and all such as shall plant there." Leaming and Spicer, *Grants, Concessions, etc.*, pp. 20-23.



the said province may be more speedily promoted." Some have thought to see in these grants an unworthy readiness to serve the interest of the Duke of York, President of the Royal African Company.<sup>1</sup> That the desire of the Lords Proprietors was anything different from that stated, namely, the rapid development of the Province, I have found no evidence to prove. To what extent slaves were actually imported even is uncertain.

The earliest legislation in New Jersey bearing on the subject of slavery is a provision in 1668 that, if "any man shall wilfully or forcibly steal away any mankind, he shall be put to death."<sup>2</sup> This provision constituted the sixth of the "Capital Laws" passed by the General Assembly at Elizabeth-Town.<sup>3</sup> It, therefore, merely formed a part of the general criminal code and was intended for the protection of persons of white race only. Another reference to slavery of a similar character is found in the "Fundamental Laws" agreed upon by the Proprietors and settlers of West Jersey in 1676. A chapter designed to secure publicity in judicial proceedings concludes with the declaration "that all and every person and persons inhabiting the said Province, shall, as far as in us lies, be free from oppression and slavery."<sup>4</sup>

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<sup>1</sup> Bancroft, *History of U. S.*, 9th ed., Vol. II, p. 316, refers to the Proprietors as, in this action "more true to the prince than to humanity." Whitehead, *East Jersey Under the Proprietary Governments*, maintains strongly that Bancroft's expression is not warranted by the evidence.

<sup>2</sup> Leaming and Spicer, p. 79.

<sup>3</sup> The provision when reenacted seven years later has the same position, L. and S., p. 105.

<sup>4</sup> Leaming and Spicer, p. 398.

That slavery was an institution which the dwellers about the Hudson and Delaware recognized and had some acquaintance with, is shown by the action of a Council at New York in 1669. A certain Coningsmarke, a Swede, popularly known as "the long Finne," having been convicted of stirring up an insurrection in Delaware, as part of his punishment was sentenced to be sent to "Barbadoes or some other remote plantation to be sold." After having been kept prisoner in the "Stadt-house at York" for a year, the long Finne was duly transported for sale to Barbadoes. Smith, S., *History of New Jersey*, pp. 53, 54.

The earliest legislation implying the actual presence of slaves in the Province is an enactment in 1675 against transporting, harboring, or entertaining apprentices, servants or slaves.<sup>1</sup> From that time on laws having reference to slavery become more and more frequent.

In general, in the Proprietary Colony (1664–1702) slaves were regarded by the law very much as were apprentices and servants. In the “Concessions” and in the earlier legislation either slaves are treated in the same way as “weaker servants,”<sup>2</sup> or slaves, apprentices and servants are treated as forming one class.<sup>3</sup> Gradually there were established special regulations for the government of slaves, until toward the end of this period we find special punishments and a special form of trial.

To what extent slave labor was employed at this time it is difficult to estimate. That slaves were an important element in the economic life of the Colony seems probable in view of the amount of legislation relating to slavery. Mr. Snell says that the earliest recorded instance of the holding of negro slaves in New Jersey is that of “Col. Richard Morris of Shrewsbury, who as early as 1680 had sixty or more slaves about his mill and plantation.” Mr. Snell thinks that by 1690 nearly all the inhabitants of northern New Jersey had slaves.<sup>4</sup>

### *Indian Slavery.*

In New Jersey, as in many of the other Colonies, Indians were held as slaves from a very early period. I have found no evidence from which to determine in what year Indian slavery first existed, or what proportions it ever actually attained. That there were Indian slaves in the Province as

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<sup>1</sup> Leaming and Spicer, p. 109.

<sup>2</sup> L. and S., pp. 20–23, *Concessions of the Lords Proprietors*.

<sup>3</sup> *Laws of 1675 and 1682*. L. and S., pp. 105 and 238.

<sup>4</sup> Snell, J. P., *History of Sussex and Warren Counties, N. J.*, p. 76.

early as 1682 there is sufficient proof. The preamble to an "Act against trading with negro slaves" passed at Elizabeth-Town in that year reads: "Whereas, it is found by daily experience that negro and Indian slaves, or servants under pretence of trade, or liberty to traffic, do frequently steal from their masters," etc.<sup>1</sup> Throughout the Act in the several places where slaves are spoken of, the designation is "negro or Indian slave" or a similar term. In many of the Colonial laws Indian slavery is recognized by the use of the enumerating phrase "negro, Indian and mulatto slaves" where slaves are referred to.<sup>2</sup> The advertisements for fugitives, found in the newspapers of the early part of the eighteenth century, show pretty clearly the actual presence of Indian slaves.<sup>3</sup> Slaves of mixed race, half negro and half Indian, are also mentioned.<sup>4</sup>

That Indians might be slaves under the laws of New Jersey was established judicially by a decision of the State Supreme Court in 1797.<sup>5</sup> The case was one of *habeas corpus* to bring up the body of Rose, an Indian woman, claimed by the defendant as a slave. It was proved that Rose's mother, an Indian woman, had been purchased as a slave and had always been considered as such. The Chief Justice, delivering the

<sup>1</sup> L. and S., p. 254.

<sup>2</sup> Allinson, pp. 5, 31, 307, 315; Nevill, I, pp. 18, 242; *N. J. Archives*, III, 473; XII, 516-520; XV, 30, 351. Also in the *State Laws of 1798 and 1820*. Paterson, p. 307, and *N. J. Statutes*, 44 ses., *Statutes*, 74. The expressions "negro slaves or others," "negroes or other slaves" are found in *Acts of 1682, 1695 and 1710*. L. and S., pp. 237, 257; *N. J. Archives*, XIII, p. 439.

<sup>3</sup> Fugitive Indian men, apparently slaves, are advertised 1716 and 1720. *Boston News-Letter*, July 23, 1716; *American Weekly Mercury*, Sept. 28, 1721; in *N. J. A.*, XI, pp. 41 and 58.

<sup>4</sup> In 1734, 1741 and 1747. *Am. Wk. Mer.*, Oct. 31, 1734; *N. Y. Wk. Journal*, May 11, 1741; *Penn. Gaz.*, Oct. 1, 1747; in *N. J. A.*, XI, 393; XII, 91, 403. One of these half-breed slaves is mentioned as the child of an Indian woman. *N. J. A.*, XII, 403.

<sup>5</sup> *N. J. Law Reports*, VI, 455-459 (1st. Halsted). *The State vs. Van-Waggoner*.

opinion of the court, said: "They [the Indians] have been so long recognized as slaves in our law, that it would be as great a violation of the rights of property to establish a contrary doctrine at the present day, as it would be in the case of Africans; and as useless to investigate the manner in which they originally lost their freedom."<sup>1</sup>

### *The Royal Governors.*

The plan for the administration of New Jersey outlined in the instructions from Queen Anne to the first royal governor, Lord Cornbury, included the regulation of slavery as existing in the Province and the development of an import trade in slaves from Africa. Lord Cornbury was directed to encourage particularly the Royal African Company of England, along with other enterprisers that might bring trade, or otherwise "contribute to the advantage" of the Colony. The Queen was "willing to recommend" to the Royal African Company that the Province "may have a constant and sufficient supply of merchantable negroes, at moderate rates," and the Governor, on his part, was instructed to "take especial care" to secure prompt payment for the same. He was to guard against encroachments on the trading privileges of the Royal African Company by inhabitants of New Jersey. He was to report annually to the Commissioners for Trade and Plantations the number of negroes imported, and the prices that they brought. The "conversion of negroes and Indians to the Christian religion" was even treated of. The consideration of the best means to encourage this pious movement was commended to the attention of the Governor, assisted by his Council and the Assembly.<sup>2</sup>

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<sup>1</sup> It was decided that the slavery of this Indian woman had been sufficiently proved, and she was remanded to the custody of her master.

<sup>2</sup> L. and S., pp. 640, 642. Instructions from Queen Anne to Lord Cornbury.



*The Slave Trade.*

In the action of the Colony on the subject of the expediency of restricting the importation of slaves, we find some indication of the position which slavery attained among the institutions of the Province, and of the popular feeling as to the desirability of the use of slave labor. The question of an import duty was one upon which at times the views of Assembly, Council, and the Lords of Trade did not agree. Queen Anne's instructions to Lord Cornbury show clearly a desire to encourage the importation of slaves. The Governor was specifically directed to report annually to the home government the number and value of the slaves that the Province "was yearly supplied with." The earliest statute on the subject was in 1714, when a duty of ten pounds was laid on every slave imported for sale.<sup>1</sup> The legislation was called forth by the desire to stimulate the introduction of white servants that the Colony might become better populated.<sup>2</sup>

To what extent slaves were actually imported at this period is largely a matter of conjecture. A report from the custom house at Perth Amboy in 1726 gives "an account of what negroes appears by the custom house books to be imported into the eastern division of this Province" since 1698.<sup>3</sup> The report states that, from 1698 to 1717 none were imported, and from 1718 to 1726 only 115. It is hardly probable that this testimony gives an accurate indication of the real amount of slave importation. Many negroes must have been brought into the Province in such a manner as not to appear on the books of the custom house at Perth Amboy. It certainly would seem strange that it should be thought desirable in

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<sup>1</sup> Allinson, S., *Acts of Gen. Assembly* (1702-1776), p. 31; *N. J. A.*, XIII, pp. 516-520; *Journal of Gov. and Council*.

This law remained in force for seven years from June 1, 1714.

<sup>2</sup> A similar law in Pennsylvania had been observed to have the desired effect.

<sup>3</sup> *N. J. A.*, V, p. 152.

1714 to pass an act laying a duty upon slaves imported, if actually, there had been little or no importation for fifteen years previously.<sup>1</sup>

The law of 1714 was permitted to expire in 1721, and for nearly fifty years there was no duty upon the importation of negroes, although during that period bills to establish such a duty were at several times before the governing houses.<sup>2</sup> In 1744, a bill plainly intending an entire prohibition of the importation of slaves from abroad was rejected by the Provincial Council.<sup>3</sup> That body declared that even the mere discouragement of importation was undesirable. The Council maintained that the Colony at that time had great need of laborers. An expedition to the West Indies had drawn off from the Province many inhabitants. The privateering profession had attracted many others. For these causes, wages had risen so high that "farmers, trading-men, and tradesmen" only with great difficulty were able to carry on their business. The Council expected little relief from Ireland; for, since the establishment of the linen manufacture on that island, there had been little emigration. The Silesian war in Europe allowed slender hope of help from Germany or England. Under the existing conditions, encouragement of slave importation rather

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<sup>1</sup> A similar inference may be drawn from information afforded by an extract from the minutes of the Friends' Yearly Meeting held at Burlington in 1716, given by Mr. J. W. Dally. From this extract we learn that certain Friends at a Quarterly Meeting at Shrewsbury had shown great solicitude for the discouragement of the importation of slaves, although the question had received consideration at the previous Yearly Meeting. Dally, *Woodbridge and Vicinity*, p. 73.

<sup>2</sup> In 1739, a bill was passed by the Assembly, but rejected by the Council. The Assembly and Council were just then at odds on the subject of governmental appropriations. Possibly the strained relations may have influenced the action on this bill. See *Assem. Jour.*, Dec. 5, 1738, Feb. 16, 1739, and *N. J. A.*, XV, 30, 31, 45, 50 (*Jour. of Gov. and Council*).

<sup>3</sup> The bill imposed a duty of ten pounds upon all slaves imported from the West Indies, and five pounds upon all from Africa. *N. J. A.*, VI, 219, 232, and XV, 351, 384, 385 (*Jour. of Provin. Council*); *Assem. Jour.*, Oct. 9 to Nov. 7, 1744.

than prohibition of it, was needed, in the opinion of the Council. Again, in 1761, the question of a duty was under discussion. The free importation of negroes had then become a source of inconvenience. A large number of slaves were "landed in this Province every year in order to be run into New York and Pennsylvania" where duties had been established. Furthermore, New Jersey had become overstocked with negroes. In response to two petitions from a large number of the inhabitants of the Colony, praying for a duty on all negro slaves imported, a bill for that purpose was introduced into the Assembly.<sup>1</sup> Governor Hardy, however, informed the House that his instructions would not permit him to assent to the bill,<sup>2</sup> and it was abandoned. At the request of the Assembly, the Governor laid the matter before the Lords of Trade, and besought them for some relief.<sup>3</sup> Less than a year later Governor Hardy assented to a bill<sup>4</sup> imposing import duties; but insisted upon a suspending clause that the act should not take effect until approved by the King. The Lords of Trade, because of technical faults in the bill, did not lay it before the King; but, at the same time, they disclaimed any opposition to the policy of an import duty.<sup>5</sup>

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<sup>1</sup> The Assembly voted that the duties to be provided for in this bill should not be so high as to amount to a prohibition (*Assem. Jour.*, Dec. 3, 1761).

<sup>2</sup> He was forbidden to give his "assent to any act imposing duties upon negroes imported into this Province, payable by the importer; or upon any slaves exported, that have not been sold in the Province, and continued there for the space of twelve months" (*Assem. Jour.*, Dec. 4, 1761).

<sup>3</sup> *N. J. A.*, IX, 345. Letter from Gov. Hardy to the Lords of Trade. *Assem. Jour.*, Nov. 30 to Dec. 8, 1761.

<sup>4</sup> Sept. 25, 1762. The act laid a duty of forty shillings in the Eastern and six pounds in the Western division of the Province. The reason for the discrimination was that Pennsylvania had a duty of ten pounds, while New York charged only two pounds. Allinson, p. 253; *N. J. A.*, IX, 383 (Letter from Gov. Hardy to the Lords of Trade). XVII, 333, 338-385, (*Jour. of Council*); *Assem. Jour.*, Sept. 23-25, 1762.

<sup>5</sup> *N. J. A.*, IX, 447 (Letter from Lords of Trade to Gov. Franklin). XVII, 385; see also IX, 444.

Finally, in 1767, an act limited to two years was passed;<sup>1</sup> and at its expiration a more comprehensive law followed which was in force during the remainder of the Colonial period.<sup>2</sup> The preamble to the law of 1769 states that the act was passed because several of the neighboring Colonies had found duties upon the importation of negroes to be beneficial in the introduction of sober, industrious foreigners as settlers and in promoting a spirit of industry among the inhabitants in general, and in order that those persons who chose to purchase slaves might "contribute some equitable proportion of the public burdens." It was enacted that the purchaser of a slave which had not been in the Colony a year, or for which the duty had not yet been paid, should pay to the county collector the sum of fifteen pounds.<sup>3</sup>

In 1773, several petitions were presented to the Assembly praying that the further importation of slaves might be prohibited and that manumission might be made more easy. In response, two bills were introduced for the above purposes, respectively. The bill regarding manumission, however, seems to have aroused such interest as to have overshadowed entirely the bill for laying a further duty on the purchasers of slaves; for nothing is heard of the latter beyond its second reading and recommitment.<sup>4</sup>

In the early years of the royal Colony, the home government is inclined to encourage the importation of slaves. The Assembly favors restriction of importation, apparently on purely economic grounds, and succeeds in passing a law to that end. For nearly fifty years the attempts of the Assembly to carry out its policy are defeated, at first by the Council,

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<sup>1</sup>This law abandoned the awkward discrimination between East and West Jersey of the bill of 1762, and imposed a uniform duty for the whole Colony. Allinson, pp. 300 and 353. Whitehead, *Perth Amboy*, p. 320.

<sup>2</sup>This act was to be in force for ten years.

<sup>3</sup>Any purchase made upon the waters surrounding the Province was considered a purchase within the Province (Allinson, p. 315).

<sup>4</sup>*Assem. Jour.*, Nov. 30 to Dec. 13, 1773.



then by the opposition of the Governor in accordance with his official instructions, then by legal technicality. Finally, the resistance is overcome, and a law laying a duty is passed. Economic motives are again given as the cause of the legislation; but it is probable that the persistence of the Assembly was due to the influence of the Friends,<sup>1</sup> among whom a strong abolition movement had been going on.

Late in the year 1785, a petition from a great number of the inhabitants of the State was presented to the Assembly, praying for legislation to secure the gradual abolition of slavery and to prevent the importation of slaves. In response to this petition, an act was passed early in 1786<sup>2</sup> inflicting a penalty of fifty pounds for bringing slaves into New Jersey that had been imported from Africa since 1776, and a penalty of twenty pounds for all others imported.<sup>3</sup> Foreigners, and others having only a temporary residence, might bring in their slaves without duty; but might not dispose of them in the State. The legislation against the slave trade met with in the Colonial period was entered upon from considerations of economic expediency, if we are to judge from the explanations of the legislators. In the act of 1786 we find legal recognition of the ethical side of the question. The preamble declares that the "principles of justice and humanity require that the barbarous custom of bringing the unoffending Africans from their native country and connections into a state of slavery" be discountenanced.<sup>4</sup> Further petitions<sup>5</sup> for the suppression of the negro trade and the gradual abolition of

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<sup>1</sup> See *N. J. A.*, IX, 346. Note by W. Nelson (editor).

Mr. Nelson thinks that the law of 1769 was caused by the anti-slavery movement among the Friends.

<sup>2</sup> *Assem. Jour.*, Nov. 1, 1785, to March 2, 1786. *Acts of Assem.*

<sup>3</sup> Persons coming to settle in New Jersey must pay duty on such of their slaves as had been imported from Africa since 1776; but were not charged for the others.

<sup>4</sup> Even this act continues, "and sound policy also requires," that importation be prohibited, in order that white labor may be protected.

<sup>5</sup> *Assem. Jour.*, Nov. 6-10, 1788.

slavery, one from the Society of Friends and another from certain inhabitants of the town of Princeton, led the legislature in 1788 to pass a supplement to the law of 1786. This supplement<sup>1</sup> carried the non-importation principle still farther and inflicted a forfeiture of vessels, appurtenances and cargo upon those who fitted out ships for the slave trade. Masters of vessels who resisted the persons attempting to seize were fined fifty pounds. Not only was the import trade in slaves forbidden, but the export trade also. No slave that had resided within the State for the year past could be removed out of the State with the intention of changing his legal residence, without his consent, or that of his parents. The prohibition did not apply to persons emigrating to settle in a neighboring State and taking their slaves with them.<sup>2</sup>

The abolition law of 1804 and the increasing strength of the public sentiment against slavery inclined masters to send their negroes out of the State, and a further law forbidding exportation was passed in 1812.<sup>3</sup> Again, in 1818,<sup>4</sup> in answer to a memorial from a number of the inhabitants of Middlesex County, praying for a more efficient law to prevent the kidnapping of blacks and carrying them out of the State, an act was passed inflicting heavy penalties, both of fine and imprisonment for exporting, contrary to law, slaves or servants of

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<sup>1</sup> Acts of 13th Gen. Assem., *Assem. Jour.*, Nov. 6-25, 1788.

<sup>2</sup> These several provisions were virtually re-enacted ten years later in the comprehensive slave law of 1798, excepting that the money penalties inflicted were, on the whole, made lighter. Paterson, W., *Laws of N. J.*, revised 1800, p. 307.

The law was not so construed by the courts as to prevent an immigrant, bringing in slaves among his dependents, from ever and under all circumstances disposing of such slaves. An instance in 1807 is recorded, when a slave imported conformably to law was sold from prison after two years residence within the State. *The State vs. Quick*, 1st Pennington, p. 393.

<sup>3</sup> 36 Ses., 2 sit., *Statutes*, 15. *Assem. Jour.*, Jan. 10-29, 1812; also Nov. 8, 1809.

<sup>4</sup> *Assem. Jour.*, Oct. 28 to Nov. 4, 1818. 43 Ses., *Statutes*, 3; also *Assem. Jour.*, Jan. 19-30, 1818.

color for life or years.<sup>1</sup> Any person who had resided within the State for five years, desiring to remove from it permanently might take with him any slave that had been his property for the five years preceding the time of removal, providing that the slave was of full age and had consented to the removal. These facts must be proven before the Court of Common Pleas, and a license to carry the slave out of the State be given by the court. Any master of a vessel receiving and carrying out of the State any slave for whose exportation a license had not been obtained was liable to a heavy fine and imprisonment. An inhabitant of New Jersey going on a journey to any part of the United States might take his slave with him; but if the slave was not brought back the master became liable to a heavy penalty unless he could prove that it had been impossible for the slave to return. These provisions mark the final suppression of the slave trade in New Jersey.

### *The Anti-Slavery Movement.*

We find during the latter part of the Colonial period growing recognition of the iniquity of human slavery. It is among the Quaker inhabitants that this moral development is observed. As early as 1696,<sup>2</sup> the Quakers of New Jersey and Pennsylvania voted in their Yearly Meeting to recommend to Friends to cease from further importation of slaves. A cautious disapproval of slavery is again seen in the action of the Yearly Meeting in 1716. Out of consideration for those Friends whose consciences made them opposed to slavery, "it is desired," the minutes read, "that Friends generally do as much as may be to avoid buying such negroes as shall be hereafter brought in, rather than offend any Friends who are against

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<sup>1</sup> All the legislation on this subject reached its final and permanent form in the compiled Statute of 1820 (44 Ses., *Statutes*, 74).

<sup>2</sup> Gordon, *History of N. J.*, p. 57.

it," . . . "yet, this is only caution, not censure."<sup>1</sup> These suggestions seem to have been received favorably and to have been put into practice. At a monthly meeting held at Woodbridge in 1738, it was stated that, not for several years had any slaves been imported by a Friend, or had any Friend bought negroes that had been imported.<sup>2</sup>

This is the period of the life and work of John Woolman (1720–1772), one of the earliest and noblest of those who in this country labored for the abolition of human slavery. But a poor, unlearned tailor of West-Jersey, his simplicity and pure, universal charity gave him far-reaching influence among the Friends. These qualities, as shown in his "Journal," together with the exquisite style of his writing, have called forth the admiration of literary circles. He travelled about as a minister among the Friends North and South, preaching and urging his associates to do away with slavery. In 1754, he published "Some Considerations on the Keeping of Negroes," in which he contends that slaveholding is contrary to Scripture.<sup>3</sup>

In 1758, the Philadelphia Yearly Meeting, largely as the result of a moving appeal by Woolman, voted that the Christian injunction to do to others as we would that others should do to us, "should induce Friends who held slaves 'to set them at liberty, making a Christian provision for them.'"<sup>4</sup> In succeeding years this Meeting expressed itself more and more resolutely as opposed to slavery. At one stage in the movement, New Jersey Friends who inclined to free their slaves, were deterred from so doing because of the law requiring masters manumitting slaves to enter into security to maintain the negroes in case they have need of relief. These masters compromised the matter by retaining in their possession young

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<sup>1</sup> Extract given by Mr. J. W. Dally in his *Woodbridge and Vicinity*, p. 73.

<sup>2</sup> *Ibid.*

<sup>3</sup> Whittier, J. G., *John Woolman's Journal, Introduction*; also *N. J. Ar.*, IX, 346. Note by W. Nelson (ed.).

<sup>4</sup> Whittier's *Introduction to Woolman's Journal*, p. 19.



negroes and forcing them to work without wages until they reached the age of thirty, while at the same time declining to hold any slaves for life.<sup>1</sup> The movement proceeded by moderate advances. Mr. Dally states that a report was made to the Monthly Meeting at Plainfield in August, 1774, showing "that at this time only one negro, 'fit for freedom' within the jurisdiction of the Society, remained a slave."<sup>2</sup> Finally, in 1776, the Philadelphia Yearly Meeting directed the subordinate meetings to "deny the right of membership to such as persisted in holding their fellowmen as property."<sup>3</sup>

The persistent effort for the restriction of slave importation culminating in the law of 1769 was, no doubt, largely due to the growing anti-slavery sentiment among the Friends.<sup>4</sup> Again, in the fall of 1773, no less than eight petitions were presented to the Assembly from inhabitants of six different counties,<sup>5</sup> all setting forth the evils arising from human slavery, and praying for an alteration of the laws on the subject. The reforms desired were chiefly the prohibition of importation and increased freedom of manumission. Of the two bills introduced for these purposes, the one regulating manumission alone excited much interest; the other was soon dropped. A counter-petition against the manumission bill was presented, and, in view of the attention called forth, it was decided to have the bill printed for the information of the public and defer action until the next session; after which nothing further was done.<sup>6</sup>

A petition of strong anti-slavery character, praying the Legislature to "pass an act to set free all the slaves now in the Colony," was presented to the House in 1775 by fifty-two

<sup>1</sup> Woolman's *Journal*, p. 224.

<sup>2</sup> Dally, *Woodbridge*, p. 218.

<sup>3</sup> Whittier's *Introduction*, p. 23.

<sup>4</sup> *Supra*, p. 20.

<sup>5</sup> The counties were Burlington, Monmouth, Cumberland, Essex, Middlesex and Hunterdon.

<sup>6</sup> *Assem. Jour.*, Nov. 19, 1773, to Feb. 16, 1774; also Jan. 28 to Feb. 7, 1775.

inhabitants of Chesterfield in Burlington County.<sup>1</sup> In 1778, Governor Livingston asked the Assembly to make provision for the manumission of the slaves. The House thought that the times were too critical for the discussion of such a measure, and requested that the message be withdrawn. The Governor reluctantly consented, yet at the same time stating that he was determined, as far as his influence extended, "to push the matter till it is effected, being convinced that the practice is utterly inconsistent with the principles of Christianity and humanity; and in Americans who have almost idolized liberty, peculiarly odious and disgraceful."<sup>2</sup>

The New Jersey State Constitution, adopted in 1776,<sup>3</sup> contained no Bill of Rights. There was no provision ascribing natural rights to all persons. Although there is little doubt that the New Jersey courts would have been wholly opposed to construing such a provision as abolishing slavery; yet even if the courts had been so inclined, as happened in Massachusetts,<sup>4</sup> there was no opportunity for such a decision. The common law of England and the former statute law of the Colony were declared in force.

A society for promoting the abolition of slavery was formed in New Jersey as early as 1786.<sup>5</sup> A constitution adopted at Burlington in 1793<sup>6</sup> provides for an annual meeting of members from the whole State and for county meetings half-yearly. The preamble, after mentioning "life, liberty and the pursuit of happiness" as "universal rights of men," concludes with the statement, "we abhor that inconsiderate, illiberal, and

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<sup>1</sup> *Assem. Jour.*, Nov. 20, 1775.

<sup>2</sup> Bancroft, *Hist. of U. S.*, Vol. V., p. 411.

<sup>3</sup> Wilson, *Acts of State of N. J.* (1776-1783); also Poore's *Collection*.

<sup>4</sup> *Winchendon vs. Hatfield*, 4th Mass. Rep., 123.

<sup>5</sup> Williams, *Hist. of Negro Race in America*, p. 20.

<sup>6</sup> *N. J. Hist. Soc. Pamphlets*, Vol. VI.

The constitution adopted at Trenton in 1786 was frequently amended in succeeding years. The one agreed upon at Burlington in 1793 must have had some permanence, as it was printed and is now accessible.

interested policy which withholds those rights from an unfortunate and degraded class of our fellow creatures." The society was active and contained many able men. It was influential in obtaining the passage of laws for the gradual abolition of slavery,<sup>1</sup> and in securing before the courts the protection to slaves provided for in the statutes.<sup>2</sup> Its membership, however, in the early part of the present century, was not large. The president stated in 1804 that probably not more than 150 persons throughout the State were in active association with the society. The aims of the society at this period were moderate. The president, in an address in 1804, declared that it was not "to be wished, much less expected, that sudden and general emancipation should take place." He thought that the true policy was to "steadily pursue the best means of lessening, and by temperate steps, of finally extinguishing the evil."<sup>3</sup>

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<sup>1</sup> *Assem. Jour.*, Jan. 28, 1794, records a "Petition from Joseph Bloomfield, styling himself President of a Society for promoting the Abolition of Slavery," praying that some measures may be established by law to promote the abolition of slavery." See also Nov. 22, 1802.

<sup>2</sup> The supreme court would not require persons acting with this end, to pay costs. In *The State vs. Frees*, the court refused to compel the Salem Abolition Society, the prosecutor of the writ of *habeas corpus* for the negroes in the case, to pay costs. The Chief Justice said that in no case would such prosecutors be compelled to pay costs; that "it was a laudable and humane thing in any man or set of men to bring up the claims of those unfortunate people before the court for consideration." *N. J. Law Rep.*, I, 299 (Coxe).

<sup>3</sup> There were local societies also. In 1802 the "Trenton Association for promoting the Abolition of Slavery" published its constitution, in order to evince to the public "that no improper or impertinent motives produced our association; and that no illegal, unjust or dishonorable means will be employed to accomplish our objects."

The members, convinced of the iniquity of personal slavery, had associated themselves together to endeavor by all constitutional and lawful means to ameliorate, as far as lay within their power, the situation of slaves, "to encourage and promote the gradual abolition of slavery," "and to improve the condition of and afford all reasonable protection and assistance to the blacks, and other people of color, who may be among us."

A petition in 1785, praying for the gradual abolition of slavery and the suppression of further importation of slaves, from a great number of the inhabitants of the State, resulted in the law of 1786 against importation and providing for manumission without security. This law is the first that recognizes that any question of ethics is involved in the holding of slaves.<sup>1</sup> Similar petitions to the above, from the Society of Friends and from citizens of Princeton, led two years later to the supplementary law of 1788 enacting very stringent measures for the overthrow of the slave trade.<sup>2</sup> A petition praying for the abolition of slavery, from certain inhabitants of Essex and Morris counties, was received in the Assembly in 1790, and referred to a committee. The committee reported to the effect that the position of the slaves under the existing laws was very satisfactory; that, although it might be thought desirable to pass a law making slaves born in the future free at a certain age, for example, twenty-eight years, yet that, "from the state of society among us, the prevalence and progress of the principles of universal liberty, there is little reason to think there will be any slaves at all among us twenty-eight years hence, and that experience seems to show that precipitation in the matter may do more hurt than good, not only to the citizens of the State in general, but the slaves themselves."<sup>3</sup>

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It was the "duty of the Acting Committee to carry into effect the resolves of the Association," "to give attention to all objects entitled to relief by the laws of the land," "to state their cases, by themselves or counsel, before the proper judicatures," etc.

Further, a Standing Committee of the Association had the following duties:

1. To superintend the morals and general conduct of the free blacks, and to give advice, instruction, protection and other friendly offices.
2. To superintend the instruction of children, and encourage them to good morals and habits of temperance and industry.
3. To place out children as apprentices.
4. To procure employment for men and women who are able to work, and to encourage them to bind themselves out to a trade. (*"True American,"* March 2, 1802.)

<sup>1</sup> *Supra*, p. 18.

<sup>2</sup> *Supra*, pp. 18 and 19.

<sup>3</sup> *Assem. Jour.*, May 24 and 26, 1790.



Notwithstanding the alluring optimism of the Assembly's committee anti-slavery petitions<sup>1</sup> continued to be presented to the House, and provisions to establish a system of gradual abolition were frequently before that body in the following years.<sup>2</sup> In the passage of the general slave law of 1798, a provision ordaining that all children born to slaves in the future should be free on attaining the age of twenty-eight years failed only by a very narrow majority.

In the year 1804, an act for the gradual abolition of slavery within the State was passed after the bill had run through two sessions of the legislature.<sup>3</sup> Every child born of a slave after the fourth of July of that year was to be free, but should remain the servant of the owner of the mother, as if bound out by the overseers of the poor, until the age of twenty-five years, if a male, and twenty-one years, if a female. The right to the services of such negro child was perfectly clear and free. It was assignable or transferable.<sup>4</sup> One person might be the owner of the mother and another have gained the right to the services of the child. Masters were compelled to file with the county clerk a certificate of the birth of every child of a slave.<sup>5</sup> This certificate was kept for future evidence of the age of the child. The owner of the mother must maintain the child for one year; after that period he might, by giving due notice,

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<sup>1</sup>*Assem. Jour.*, Oct. 24, Nov. 21, 1792; Jan. 28, Nov. 10, 1794.

<sup>2</sup>*Assem. Jour.*, Oct. 25, 1792; May 21, 1793; Feb. 4, 1794; Feb. 14, 1797; Jan. 19, March 8, 1798.

<sup>3</sup>28 Ses., 2 sit., *Statutes* 251. Here, again, the bill was introduced in answer to a memorial from the New Jersey Abolition Society. The bill was published for the general information of the people before it was finally acted upon. *Assem. Jour.*, Nov. 22, 1802 to Feb. 15, 1804.

<sup>4</sup>This point was established by the Supreme Court in 1827. The Chief Justice declared that services of this character were a "species of property," and were "transferred from one citizen to another like other personal property." *Ogden vs. Price*, *N. J. Law Rep.*, IX, 211-217 (4th Halsted).

<sup>5</sup>The book *Black Births* of Bergen County, contains the certificates for that county. The descriptions are generally very brief, frequently giving nothing more than the name of the child. It seems remarkable that such records should have been sufficient to prove a man's freedom.

abandon it. Every negro child thus abandoned, like other poor children, was to be regarded as a pauper of the township or county, and be bound out to service by the overseers of the poor. This provision, allowing masters to refuse to maintain children born to their slaves, was the source of considerable fraud upon the treasury, and was the cause of many supplements and amendments<sup>1</sup> to the law of 1804 in succeeding years. Finally, seven years later the provision was repealed,<sup>2</sup> the reason given being "it appears that large sums of money have been drawn from the treasury by citizens of the State for maintaining abandoned black children, and that in some instances the money drawn for their maintenance amounts to more than they would have brought if sold for life."<sup>3</sup>

In 1844, a new constitution was adopted in New Jersey.<sup>4</sup> The first article was in the nature of a Bill of Rights, and the first section read as follows: "All men are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." Some believed that this section abolished both slavery and that form of involuntary servitude in which children of slaves were held by the

<sup>1</sup> 1806, 1808, 1809. 30 Ses., 2 sit., *Statutes*, 668; 33 Ses., 1 sit., *Statutes*, 112; 34 Ses., 1 sit., *Statutes*, 200.

<sup>2</sup> 1811. 35 Ses., 2 sit., *Statutes*, 313. This legislation also reaches its final form in the compiled law of 1820. 44 Ses., *Statutes*, 74.

<sup>3</sup> In 1806, the State Treasurer requested the "orders of the legislature with respect to payments demanded of him for supporting black children." His report the next year shows disbursements "for abandoned blacks" amounting to half as much as all other disbursements whatever. In 1809, the expenditure for abandoned blacks amounted to two-thirds of all other expenditure; the drafts upon the treasury for the support of blacks from the County of Bergen alone amounting to \$7,033, out of a total State expenditure for blacks of \$12,570. The Treasurer called the attention of the Assembly to these latter facts, and the House directed him "to suspend all further payments in all doubtful cases for the support of abandoned blacks." *Assem. Jour.*, Nov. 5, 1806; Nov. 2-21, 1809; also *Treas. Rep.*, *Assem. Jour.*, Nov. 13, 1807; Nov. 14, 1808; Nov. 8, 1809.

<sup>4</sup> Poore's *Collection*, p. 1314.

law of 1820. The ground for this belief was, doubtless, that remarkably liberal interpretation of a similar provision in the Massachusetts constitution of 1780, by which the Massachusetts courts decided slavery to have been abolished by that constitution.<sup>1</sup> The matter came up for adjudication before the New Jersey supreme court in 1845;<sup>2</sup> but that court did not follow the Massachusetts precedent. The court declared the section in question was a "general proposition, that men in their social state are free to adopt their own form of government and enact their own laws," "that in framing their laws, they have a right to consult their safety and happiness, whether in the protection of life and liberty, or the acquisition of property." The provision was not designed, the Justice said, to apply to "man in his private, individual or domestic capacity; or to define his individual rights or interfere with his domestic relations, or his individual condition." The court then held that the constitution of 1844 had not abolished slavery or affected the slave laws existing at the time of its adoption.<sup>3</sup>

Slavery was abolished by statute in New Jersey in the year 1846.<sup>4</sup> This action did not result in complete emancipation of the slaves. The abolition law simply substituted apprenticeship in place of slavery. By virtue of the act, and without the execution of any instrument of manumission, every slave became an apprentice, bound to service to his present owner, executors, or administrators, until discharged therefrom. How similar were the two conditions<sup>5</sup> is shown when we find many

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<sup>1</sup> Mr. Moore says that this provision of the constitution of 1780 was "only a new edition of the 'glittering and sounding generalities' which prefaced the Body of Liberties in 1641;" yet the earlier instrument was never held to have abolished slavery. Moore, G. H., *Notes on the History and Slavery in Massachusetts*, p. 12.

<sup>2</sup> *The State vs. Post. The State vs. Van Buren. N. J. Law Rep.*, XX. 368-386 (Spencer).

<sup>3</sup> The case was carried up into the Court of Errors and Appeals, and the decision of the Supreme Court was confirmed. *N. J. Law Rep.*, XXI, 699.

<sup>4</sup> *Revised Statutes*, 382.

<sup>5</sup> The U. S. Census of 1850 reports 236 slaves in New Jersey, and the Census of 1860 reports 18 slaves. Evidently these must have been legally apprentices for life.

old provisions regarding slaves reproduced and reënacted for the government of the new apprentices created by the statute. Forms are established according to which apprentices may be legally discharged.<sup>1</sup> Penalties for enticing apprentices away or harboring them, or for misusing them, are provided. Apprentices are not to be carried out of the State, or sold to a non-resident. Yet this change of status represented a real improvement in the condition of the negro servant for life or years. The sale of an apprentice must be in writing and with the consent of the apprentice, expressed by his signature. An apprentice having a complaint against his master was granted the same remedy as that previously provided by law for apprentices and servants. Children born to negro apprentices were to be absolutely free from birth, and not subject to any manner of service whatsoever. They must be supported by the master until they attained the age of six years, after which they were to be bound out to service by the overseers of the poor.

New Jersey, as a State, showed also at times considerable interest in slavery in its larger aspect, as it affected general conditions in the United States. In January, 1820, the legislature passed resolutions against the admission of Missouri as a slave state.<sup>2</sup> Four years later resolutions were passed affirming, first, that in the opinion of the legislature, "a system of foreign colonization" represented a feasible plan by which might be effected "the entire emancipation of the slaves in our country;" second, that such an arrangement made convenient provision for the free blacks; third, that the evil of slavery being a national one "the duties and burdens of removing it" ought to be borne by the people and States of the Union. Copies of these resolutions were forwarded to the Governors of the several States, with the request that they lay the same before their respective legislatures, and to the New Jersey Senators and Representatives in Congress

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<sup>1</sup> A new and interesting provision is that the apprentice shall not be discharged unless he desires to be.

<sup>2</sup> *Assem. Jour.*, Jan. 13 to 19, 1820.



asking their coöperation.<sup>1</sup> In 1847, the legislature resolved<sup>2</sup> that the Senators and Representatives in Congress from New Jersey be requested to use their best efforts to secure the exclusion forever of slavery or involuntary servitude from any territory thereafter to be annexed to the United States, except as a punishment for crime. Two years later similar resolutions<sup>3</sup> were passed condemning the further extension of slavery, and urging the speedy abolition of the slave trade within the District of Columbia.

### *The Extent of Slavery.*

The use of slave labor was quite general in New Jersey during the period of the royal governors. From quotations from the census reports, given by Mr. Gordon,<sup>4</sup> we learn that there were 3,981 slaves in the Province in 1737, 4,606 slaves in 1745, and 11,423 in 1790.<sup>5</sup> Though the number of slaves was increasing constantly during this period, that increase did not keep pace with the growth of population. Slaves constituted 8.4 per cent. of the population in 1737, 7.5 per cent. in 1745, and 6.2 per cent. in 1790. In Perth Amboy, the port of entry for the eastern division of the Province, slaves were especially numerous. According to Mr. Whitehead, it

<sup>1</sup>*Assem. Jour.*, Nov. 23 to Dec. 29, 1824, and 49 Ses., *Statutes*, 191.

<sup>2</sup>71 Leg., 3 Ses., *Statutes*, 188.

<sup>3</sup>73 Leg., 5 Ses., *Statutes*, 334.

<sup>4</sup>Gordon, T. F., *Gazetteer of N. J.*, p. 29.

<sup>5</sup>Blake, *Ancient and Modern Slavery*, p. 388, says that in 1776 New Jersey contained 7,600 slaves. No authority for the statement is given. As the U. S. Census of 1790 reports 11,423 slaves in New Jersey, if Mr. Blake's figures are correct, there must have been an increase of 3,823 slaves between 1776 and 1790. That there was such a large increase seems to me very improbable, when we consider, first, that such an increase would be at a rate double that observed in the next decade; second, that the years of the war presumably were not years when the number of slaves increased rapidly. If the slave population increased at a uniform rate from 1745 to 1790 there would have been more than nine thousand slaves in the Colony in 1776.

was reported that in 1776 there was in the town only one house whose inmates were "served by hired free white domestics."<sup>1</sup> In other places the labor of families was also very commonly performed by slaves.

The maximum slave population in New Jersey given by the U. S. Census Reports is 12,422 in the year 1800. The next census shows a decrease to 10,851, in consequence of the abolition law of 1804. The number of slaves reported rapidly diminishes with each succeeding census until the last record in 1860 shows but eighteen slaves<sup>2</sup> in the State. At the beginning of the present century New Jersey had a larger slave population than any other State north of Maryland, except New York.<sup>3</sup> The coast counties from Sandy Hook to the northern boundary, and the Raritan Valley, were the regions containing the great majority of the slaves. The three great Quaker counties of Burlington, Gloucester, and Salem, containing 23 per cent. of the total State population, contained less than 3 per cent. of the slave population. The effect of the eighteenth century abolition agitation among the Friends is here clearly shown.<sup>4</sup>

<sup>1</sup> Whitehead, *Perth Amboy*, p. 318.

<sup>2</sup> These must have been legally "apprentices."

<sup>3</sup> U. S. Census, 1800. Mr. Mellick notices this fact, and thinks that it was due to the large Dutch and German population. He says that the greatest number of slaves were to be found in the counties where the Dutch and Germans predominated. *Story of an Old Farm*, pp. 220-228.

<sup>4</sup> Population of New Jersey:

Year.	Total Population.	Slaves.	Per Cent. of Slaves.	
1737	47,402	3,981	8.4	(Gordon.)
1745	61,383	4,606	7.5	"
1790	184,139	11,423	6.2	(U. S. Census.)
1800	211,949	12,422	5.8	"
1810	245,555	10,851	4.4	"
1820	277,575	7,557	2.7	"
1830	320,823	2,254	.7	"
1840	373,306	674	.18	"
1850	489,555	236*	.048	"
1860	672,035	18*	.0026	"

\* Legally "apprentices" for life.

## CHAPTER II.

### THE GOVERNMENT OF SLAVES.

Regulations bearing upon the faults and misdemeanors to which slaves are peculiarly liable first appear in New Jersey legislation in laws for the correction of truancy on the part of slaves and servants. As early as 1675,<sup>1</sup> under the Proprietary government, it was enacted that persons who assist in the transportation of a slave shall be liable to a penalty of five pounds and must make good to the owner any costs that he may have sustained. Those who entertain or harbor any slave known to be absent from his master without permission must pay to the owner "ten shillings for every day's entertainment and concealment."<sup>2</sup> The Indians by their reception of negroes appear to have caused the settlers some annoyance. We read in the Journal of the Governor and Council that, in 1682, it was "agreed and ordered that a message be sent to the Indian sachems to confer with them about their entertainment of negro servants."<sup>3</sup> Again, in 1694, the "countenance, harboring and entertaining of slaves by many of the inhabitants"

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<sup>1</sup> Leaming and Spicer, p. 109.

<sup>2</sup> These provisions were virtually reenacted in a law for East Jersey, "against fugitive servants and entertainers of them," in 1682, just after that Province came under the government of the twenty-four Proprietors. L. and S., p. 238; *N. J. Ar.*, XIII, 31, 33 and 157. In 1683, in West Jersey, in order to prevent servants from running away from their masters, magistrates and other inhabitants were directed to require from all suspicious travellers, a certificate showing that they were not fugitives. L. and S., p. 477.

<sup>3</sup> *N. J. Ar.*, XIII, 22.

calls for heavier penalties. By a law of that year such entertainment, if it extends to as much as two hours, renders the offender liable to a penalty of twenty shillings, and a proportional sum for a longer time.<sup>1</sup> Furthermore, any person may apprehend as a runaway any slave found "five miles from his owner's habitation" without a certificate of his owner's permission; and for this service the master must give recompense in money at a prescribed rate.<sup>2</sup>

During the period of the royal governors there were two new regulations bearing on the recovery of fugitives. Any slave from another Province travelling without a license, or not known to be on his master's business, was to be taken up and whipped; and should remain in prison until the costs of apprehending him had been paid by his owner.<sup>3</sup> Persons from a neighboring Colony suspected of being fugitives must produce a pass from a justice, "signifying that they are free persons," otherwise to be imprisoned until demanded.<sup>4</sup>

Under the State laws more stringent regulations referring to fugitives are found. By the law of 1786 the freedom of movement of negroes was very closely restricted. Negroes manumitted in other States were not allowed to travel in New Jersey. Any person who employed them, concealed them, or suffered them to reside or land within the State was liable to a penalty of five pounds per week. Free negroes of New Jersey were not to travel beyond their township or county without an official certificate of their freedom.<sup>5</sup> This severity was modified somewhat by the law of 1798. A free negro from another State might now travel in New Jersey provided that he produced a certificate signed by two Justices of the

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<sup>1</sup> That this entertainment of negroes was a real evil in the later Colonial period is shown by an advertisement for a fugitive slave in 1750, which reads: "and whereas he has been harboured once before, whoever informs who harbours him shall have ten pounds reward." *N. J. Ar.*, XII, 644.

<sup>2</sup> *L. and S.*, p. 340; *N. J. Ar.*, XIII, 205.

<sup>3</sup> Act for regulating of slaves, 1714; Nevill, I, 18.

<sup>4</sup> 1714. Nevill, I, 24.

<sup>5</sup> Acts of General Assembly.



Peace of his State showing his freedom.<sup>1</sup> That all black men should be regarded as slaves until evidence appeared to the contrary, was held by the Supreme Court even as late as 1826.<sup>2</sup> Yet by the U. S. Census of 1820, New Jersey contained nearly twice as many free negroes as slaves. The court receded from this position ten years later, the injustice of the ruling having become very obvious owing to the small proportion which slaves bore to the colored population.<sup>3</sup>

The ferries from New Jersey to New York constituted routes by which fugitive slaves occasionally escaped. On July 4, 1818, a slave mingling in the holiday crowd gained a passage on the ferry-boat running from Elizabeth-Town to New York, and, after reaching the latter place, escaped. The master of the slave sued the owner of the ferry-boat and obtained damages for the loss of the slave.<sup>4</sup> Seven years later there is recorded a similar escape on a steamboat running from Perth Amboy to New York.<sup>5</sup>

The apprehension of fugitive slaves from other States was provided for with great care by a law of 1826.<sup>6</sup> On the proper application<sup>7</sup> by the master, a fugitive might be arrested by the sheriff and brought before a judge of the inferior Court of Common Pleas. If the judge deemed that there was enough proof he was to give the claimant a certificate, which should be sufficient warrant for the removal of the fugitive from the

<sup>1</sup> Any person harboring, concealing or employing any negro without such a certificate was liable to a fine of \$12 for every week of such action. Paterson, p. 307.

<sup>2</sup> Fox vs. Lambson, *N. J. Law Rep.*, VIII, 339-349 (3rd Halsted). This principle was authoritatively established, in 1821, by the case of Gibbons vs. Morse carried up to the court of errors and appeals, *N. J. Law Rep.*, VII, 305-327 (2nd Halsted); and reaffirmed in Fox vs. Lambson.

<sup>3</sup> Stoutenborough vs. Haviland, *N. J. Law Rep.*, XV, 266-269 (3rd Green).

<sup>4</sup> Gibbons vs. Morse.

<sup>5</sup> Cutter vs. Moore, *N. J. Law Rep.*, VIII, 270-278 (3rd Halsted).

<sup>6</sup> 51 Ses., *Statutes*, 90.

<sup>7</sup> Application by the master, personally or by attorney, to any judge of any inferior Court of Common Pleas or Justice of the Peace.

State. A case falling under this law, and carried up to the Supreme Court in 1826, led to a debate in that court which called in question the justice of the law. The judges concurred in discharging the prisoner, a negro claimed as a runaway slave from Maryland; but showed great disagreement in the discussion of the merits of the case. Chief Justice Hornblower held that questions of fact were involved, such as, was the negro lawfully held to service in the State from which he came? has he fled into this State? has the claimant any right to his services? Here were facts which must be judicially determined, "facts which involve the dearest rights of a human being." These facts the Justice believed should not "be tried and definitely sealed in a summary manner, and without the verdict of a jury."<sup>1</sup> The next year, probably as the result of the discussion in the Supreme Court, the fugitive slave law was amended.<sup>2</sup> A judge having a fugitive brought before him must appoint a certain time and place for the trial of the case, and associate with him two other judges. Either party might demand trial by jury.<sup>3</sup>

### *Other Police Regulations.*

Besides the provisions for the correction of truancy, various other police regulations were established from time to time. The early inhabitants of East Jersey appear to have been much troubled by the thievishness of their slaves. The complaint was that slaves stole from their masters and others and then sold the stolen goods at some distance away. In the belief that a market was necessary to make pilfering worth while, all traffic whatever with slaves was forbidden in 1682,

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<sup>1</sup> The State vs. Sheriff of Burlington. Hurd, *Law of Freedom and Bondage*, II, 64-67. Owing to disagreement among the judges as to the proper extent of the discussion, the case was not given in the *State Reports*.

<sup>2</sup> 61 Ses., 2 sit., *Statutes*, 134.

<sup>3</sup> In the revision of 1847 virtually the same law was approved and so stood as the fugitive slave act of the State. *Revision of 1847*, p. 567.

under heavy penalties.<sup>1</sup> If any slave were found offering goods for sale without the permission of his master it was the duty of the person to whom the article was offered to take up and whip the slave, for which service the master must pay a reward of half a crown.<sup>2</sup> Later, in the same Province, we read that slaves allowed to hunt with dog and gun killed swine under pretence of hunting. In 1694, slaves were prohibited from carrying any "gun or pistol," and from taking any dog with them into the "woods or plantations," unless accompanied by the master or his representative.<sup>3</sup> If any person "lend, give or hire out" a pistol or gun to a slave, that person must forfeit the gun or twenty shillings to the owner of the slave.<sup>4</sup> In West Jersey, in the Proprietary period, the selling of rum to negroes was found to be productive of disorder. Any person "convicted of selling or giving of rum, or any manner of strong liquor, either to negro or Indian," except the stimulant be given in relief of real physical distress, becomes liable to a penalty of five pounds by a law of 1685. As the offense was one difficult of detection, "one creditable witness or a probable circumstance" was accounted "sufficient evidence," unless the accused gave his "oath or solemn declaration that he has not transgressed the law."<sup>5</sup>

Regulations against harboring, trading with, or selling rum to slaves were reënacted during the period of the royal Governors, and in the State legislation.<sup>6</sup> Others were added, such as: the prohibition of large or disorderly meetings of slaves,<sup>7</sup>

<sup>1</sup> Similar penalties are found in the slave law of 1714, and thus held throughout the Colonial period.

<sup>2</sup> L. and S., 254; *N. J. Ar.*, XIII, 82. Law passed at Elizabeth-Town.

<sup>3</sup> Act passed at Perth Amboy. L. and S., 340; *N. J. Ar.*, XIII, 205.

<sup>4</sup> By the same law, no inhabitant should allow his slave to keep swine marked with another brand than the owner's. This provision was probably intended to prevent dishonesty on the part of masters.

<sup>5</sup> Act passed at Burlington. L. and S., 512.

<sup>6</sup> Laws of 1714, 1738, 1751 and 1798. Nevill, I, 242; Allison, 191; Pater-son, 307.

<sup>7</sup> Laws of 1751 and 1798.

the rule that all slaves must be at home after a certain hour at night,<sup>1</sup> that slaves shall not go hunting or carry a gun on Sunday,<sup>2</sup> that slaves shall not set a steel trap above a specified weight,<sup>3</sup> that slaves shall not be permitted to beg.<sup>4</sup> For the correction of the smaller faults and misdeeds there was the workhouse. A law of 1754 provided that in the borough of Elizabeth, servants and slaves accused of "any misdemeanor or rude or disorderly behavior," being brought before the Mayor, may be "committed to the workhouse to hard labor" and receive corporal punishment not exceeding thirty stripes.<sup>5</sup> In 1799 the system was established throughout the State. "Any stubborn, disobedient, rude or intemperate slave or male servant" might be committed to the workhouse to endure confinement and labor at the discretion of a Justice of the Peace. The master paid the cost of maintenance of the slave while so confined.<sup>6</sup>

### *The Criminal Law for Slaves.*

During nearly the whole period of the Proprietary Colony the same general criminal laws governed both slaves and free-men. The bond as well as the free were tried in the ordinary courts, for crimes and misdemeanors. In 1695 a change was made. Special courts were provided for the trial of slaves

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<sup>1</sup> Nine o'clock by law of 1751, ten o'clock by law of 1798.

<sup>2</sup> Laws of 1751 and 1798. These laws, however, did not prevent a negro or slave from going to any place of worship, or from burying the dead, or from doing any other reasonable act, with his master's consent.

<sup>3</sup> In 1760 an "Act to regulate the size of traps to be hereafter set in this Colony" directed that any slave setting a steel trap above a specified weight "shall be whipped with thirty lashes and committed until the cost is paid." *N. J. Statutes*, p. 61.

<sup>4</sup> The law of 1798 imposed a penalty of \$8 for permitting slaves to beg, one-half to be paid to the overseers of the poor and one-half to the person who prosecuted.

<sup>5</sup> Nevill, II, 25, 29.

<sup>6</sup> An act for the establishment of workhouses in the several counties of this State. Paterson, 379.



and an exceptional form of punishment was prescribed for slave offenders.<sup>1</sup> Slaves accused of a felony or murder were to have trial by jury before three Justices<sup>2</sup> of the Peace of the county, and on conviction were to receive, in general, the punishments "appointed for such crimes."<sup>3</sup> Under the royal governors, the law of 1714 adhered to the principle of special courts for slaves. Ordinarily the trials of slaves for capital offences were to be before three or more Justices of the Peace and five principal freeholders of the county; but the master might demand trial by jury.<sup>4</sup> In 1768 the use of special courts was discontinued, and slaves accused of capital offences were once more tried in the ordinary courts<sup>5</sup> as freemen were. The reason given for this return to earlier practice was that the method by special courts had "on experience been found inconvenient."<sup>6</sup> Throughout the period of the royal governors special forms of punishment were provided for slaves. Not until 1788, under the State government, was it enacted that all criminal offences of negroes should be punished in the same manner as the criminal offences of other inhabitants of the State were.<sup>7</sup> Even under the State legislation the provisions allowing corporal punishment or transportation to be substituted in some cases for the usual punishment, at the discretion of the court, violated somewhat the principle of uniformity of procedure.

As might be expected from the grade of civilization developed in the various Colonies and the accompanying stringent

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<sup>1</sup> Act passed at Perth Amboy, 1695. L. and S., 357.

<sup>2</sup> One being of the quorum.

<sup>3</sup> The special punishment provided was, that slaves convicted of stealing should receive corporal punishment, not exceeding forty stripes, the master making good the amount stolen.

<sup>4</sup> Allinson, 18.

<sup>5</sup> The courts mentioned were the Supreme Court, Court of Oyer and Terminer and General Gaol Delivery, and Court of General Quarter Sessions of the Peace.

<sup>6</sup> Allinson, 307.

<sup>7</sup> Acts of 13th General Assembly.

criminal code, the punishments provided for slaves in New Jersey throughout the Colonial period were severe and often cruel.<sup>1</sup> As early as 1704 the Lords of Trade recommended to the Queen the repeal of an act lately passed by the Assembly because one clause inflicted inhuman penalties upon negroes.<sup>2</sup> By the slave law of 1714<sup>3</sup> any "negro, Indian or mulatto slave" murdering or attempting the death of any freeman, wilfully murdering any slave, committing arson, "rape on any free subject," or mutilation of any free person, is to suffer the penalty of death.<sup>4</sup> The manner of death, however, is not specified, but is to be such as the "aggravation or enormity of their crimes" (in the judgment of the justices and freeholders trying the case) "shall merit and require." The testimony of slaves was admitted in the trials.<sup>5</sup> When a slave was executed, the owner received for a negro man thirty pounds and for a

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<sup>1</sup>That in the rough, frontier conditions of the Proprietary Colony the punishments were sometimes cruel, although slaves were tried in the ordinary courts, is evident from an instance given by Mr. Mellick. He says that in 1694 a Justice presiding at the Monmouth court of sessions, sentenced a negro convicted of murder to suffer as follows: "Thy hand shall be cut off and burned before thine eyes. Then thou shalt be hanged up by the neck until thou art dead, dead, dead; then thy body shall be cut down and burned to ashes in a fire, and so the Lord have mercy on thy soul, Cæsar" (*Story of an Old Farm*, p. 225).

<sup>2</sup>*N. J. Ar.*, III, 473, Representation of Lords of Trade to the Queen. Allinson, p. 5.

<sup>3</sup>Nevill, I, 18; Allinson, 18.

In the Journal of the Governor and Council, *N. J. Ar.*, XIII, 439, 440, 448, we find record that the Council in 1710 passed "An Act for deterring negroes and other slaves from committing murder and other notorious offenses within this Colony." The provisions are not given.

<sup>4</sup>Poisoning was sometimes practiced by slaves in the Colonial period. In 1738 two negroes, found guilty of destroying sundry persons by poison, were executed at Burlington. At Hackensack, in 1744, a negro was executed for poisoning three negro women and a horse. *N. J. Ar.*, XI, 523, 537; XII, 223.

<sup>5</sup>At the trial of the negro man "Harry" in Bergen County, 1731, who was hung for threatening the life of his master and poisoning the slave "Sepio," many negroes were summoned as witnesses. Bergen Co., "Liber A," p. 24.

woman twenty pounds, the money being raised by a poll tax upon all the slaves in the county above fourteen years of age and under fifty.<sup>1</sup> This payment made good to the master a loss of property due to no fault of his. Further, it left him no inducement to transport the slave out of the Province and thus encourage other negroes to crime by allowing the hope that punishment might be escaped. In the case of slaves attempting rape, or assaulting a free Christian, any two justices of the peace were authorized to inflict such corporal punishment, not extending to life or limb, as they might see fit. Slaves stealing under the value of five shillings were to be whipped with thirty stripes; if above five shillings, with forty stripes.<sup>2</sup>

A form of execution frequently chosen was burning at the stake. At Perth Amboy, in 1730, a negro was burnt for the murder of an itinerant tailor.<sup>3</sup> In Bergen County, in 1735, the slave "Jack" was burnt. He had beaten his master, several times had threatened to murder his master and the son of his master and to burn down his master's house, and when arrested tried to kill himself.<sup>4</sup> In Somerset County, in 1739, a negro was burnt for brutally murdering a child, attempting to murder the wife of his overseer, and setting fire to his master's barn.<sup>5</sup> In 1741 two negroes were burnt for

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<sup>1</sup> Bergen County Quarter Sessions in 1768 ordered that Hendrieck Christian Zabriskie should have thirty pounds for his negro named Harry, lately executed for the murder of Claas Toers. The money was collected from the slave-owners of the county, upon the basis of an assessment of ten pence per head upon all slaves in the county. Bergen Co. Quar. Sess., January 27, 1768.

<sup>2</sup> In Hackensack in 1769, a slave pleading guilty to the charge of stealing, was whipped at the public whipping-post and before the houses of two prominent citizens, with thirty-nine lashes on each of three days, being taken from place to place tied to a cart's tail. Bergen Co. Quar. Sess., October 24, 1769.

<sup>3</sup> *Am. Wk. Mercury*, Jan. 14-20, 1729 (1730); (*N. J. Ar.*, XI, 201).

<sup>4</sup> Bergen County, "Liber A," p. 36.

<sup>5</sup> *Boston Wk. News-Letter*, Jan. 18-25, 1739 (*N. J. Ar.*, XI, 558). In the same county, five years later, a negro was burnt for ravishing a white child. *Pa. Gazette*, Dec. 14, 1744 (*N. J. Ar.*, XII, 244).

setting on fire several barns in the neighborhood of Hackensack.<sup>1</sup> Mr. Whitehead says that the New York "Negro Plot" of 1741 caused many executions by burning as well as by hanging in New Jersey. He describes a case ten years later, near Perth Amboy, when all the negroes of the neighborhood were compelled to witness the execution.<sup>2</sup>

The criminal law of 1768, which supplanted the provisions relating to capital offences in the act of 1714, represents an increase of severity. It appointed the penalty of death for the crimes made capital under the earlier law, and for others as well. A slave convicted of manslaughter, or of stealing any sum of money above the value of five pounds, or of committing any other felony or burglary, was to suffer death or such other pains and penalties as the justices might think proper to inflict. In this law, as before, there was no specification as to the manner in which death might be inflicted.<sup>3</sup>

Under the early State legislation the severe and peculiar forms of punishment provided for slaves by the Colonial laws disappeared. In 1788, it was enacted that all criminal offences of negroes, whether slaves or freemen, should be "enquired of, adjudged, corrected and punished in like manner as the criminal offences of the other inhabitants of this State are."<sup>4</sup> This principle was firmly established by the passage in 1796 of "An Act for the punishment of Crimes," a comprehensive and fundamental criminal law, which, in general, prescribed one punishment for all persons guilty of a particular crime, mentioning no distinction between bond and free.<sup>5</sup> Slaves continued, however, to be to some extent the subject of special criminal legislation. By the law of 1796 a court might impose upon any slave, in place of the usual punishment,

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<sup>1</sup> Bergen County, "Liber A," p. 44.

<sup>2</sup> Whitehead, W. A., *Contributions to the Early History of Perth Amboy*, pp. 318-320; also *Wk. Post Boy*, July 2, 1750 (*N. J. Ar.*, XII, 652).

<sup>3</sup> Allinson, 307; *N. J. Ar.*, XVII, 483, 485, 486 (*Jour. of Prov. Council*).

<sup>4</sup> Acts of 13th Gen. Assem., Nov. 26, 1788.

<sup>5</sup> Paterson, 220.



corporal punishment at its discretion and not extending to life or limb, for any offence not punishable with death. By the act of 1801, when slaves were convicted of arson, burglary, rape, highway robbery, or assault with intent to commit murder, the court might choose to order them to be sent out of the United States.<sup>1</sup> In this case the owner was compelled to give bond that he would faithfully execute the court's decree, and finally file a certificate that the sentence has been complied with.

### *Negro Plots.*

We have seen that by the police regulations enacted for the government of slaves, negroes were forbidden to assemble together in companies, except with their master's consent for some reasonable purpose, such as to attend public worship or to bury their dead. Furthermore, slaves must be at home after nine o'clock at night.<sup>2</sup> These provisions were probably called forth by fear of slave insurrections; but it is difficult to determine to what extent the legislation was connected with actual experience of negro plots.

In 1734, a rising in East Jersey,<sup>3</sup> near Somerville,<sup>4</sup> was feared. Certain negro quarters some miles remote from the master's dwelling-house had become a rendezvous for the negroes of the neighborhood. The slaves round about stole from their masters provisions of various sorts which they carried to their place of meeting and feasted upon, sometimes in large companies. It was claimed that at one of these meetings some hundreds had entered into a plot to gain their freedom by a massacre of the whites. A belief on the part of the negroes that they were held in slavery contrary to the

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<sup>1</sup> 25 Ses., 2 sit., *Statutes*, 77. See also on this subject, *Revision of 1821*, pp. 736, 793, and 44 Ses., *Statutes*, 74, sec. 20.

<sup>2</sup> *Supra*, p. 37.

<sup>3</sup> *N. Y. Gazette*, March 18-25, 1734, gives a detailed account of the conspiracy.

<sup>4</sup> Mellick, p. 226, says that the excitement was near Somerville.

positive orders of King George appears to have been an element contributing to the excitement. According to the plan of the conspirators, as soon as the weather became mild enough so that living in the woods might be possible, at some midnight agreed upon, all the slaves were to rise and slay their masters. The buildings were to be set on fire and the draught horses killed. Finally, the negroes, having secured the best saddle horses, were to fly to the Indians and join them in the French interest. Suspicion of a negro plot was first aroused by the impudent remarks of a drunken slave. He and another negro were arrested, and at their trial the above details were brought out. The insurrection believed to be threatening was suppressed with considerable severity.<sup>1</sup>

That delirium of the New York people in 1741, known as the "Negro Conspiracy," appears to have spread to some extent into neighboring New Jersey also. Mr. Whitehead thinks that this panic caused many executions in New Jersey.<sup>2</sup> In one day seven barns were burned at Hackensack; an eighth caught fire three times, but fortunately was saved. It was believed that these were set on fire by a combination of slaves, for one negro was taken in the act. The people of the neighborhood were greatly alarmed and kept under arms every night. Two negroes charged with committing the crime were burned.<sup>3</sup> Mr. Hatfield quotes from the Account Book of the Justices and Freeholders of Essex County the following items: "June 4, 1741, Daniel Harrison sent in his account of wood carted for burning two negroes." . . . "February 25, 1741½, Joseph Heden acct. for wood to burn the negroes Mr. Farrand paid allowed 0. 7. 0. Allowed to Isaac Lyon 4/ Curr<sup>y</sup> for a load of wood to burn the first negro, 0. 4. 0."<sup>4</sup> Mr. Whitehead

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<sup>1</sup> About thirty negroes were apprehended; one of them was hanged, some had their ears cut off, and others were whipped. Poison was found on several of them. *N. J. Ar.*, XI, 333, 340.

<sup>2</sup> Whitehead, *Perth Amboy*, p. 318.

<sup>3</sup> *N. J. Ar.*, XII, 88, 91, 98.

<sup>4</sup> Hatfield, *History of Elizabeth, N. J.*, p. 364.

says that, in 1772, "an insurrection was anticipated, but was prevented by due precautionary measures."<sup>1</sup>

Mr. Hatfield tells of a panic regarding negroes at Elizabeth-Town during the Revolution.<sup>2</sup> In June, 1779, a conspiracy of the negroes to rise and murder the people of the town was discovered. The Tories, whose plundering expeditions had been very exasperating, were held responsible for this new danger also. The resentment aroused by these occurrences caused the Court of Common Pleas to enter severe judgments against many Tories. Mr. Atkinson states that in 1796 there was, among the whites, great fear of negro violence, and a feeling of bitterness toward the slaves was developed.<sup>3</sup> The agitation was caused by the attempts of certain blacks to set fire to buildings in New York, Newark and other places.

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<sup>1</sup> Whitehead, *Perth Amboy*, pp. 318-320.

<sup>2</sup> Hatfield, p. 476.

<sup>3</sup> Atkinson, J., *History of Newark, N. J.*, pp. 170-172.

## CHAPTER III.

### THE LEGAL AND SOCIAL POSITION OF THE NEGRO.

The subject of manumission began to demand legislative action at the time of the royal governors. According to what forms manumission should be legal, what limitations it might be expedient to place on the power to manumit; these were considerations which then became of great consequence and retained their prominence even until after the disappearance of slavery from New Jersey life. Furthermore, the interpretation given by the courts to the existing law of manumission often decided for the colored man whether his position was that of freeman or slave.

Very early in the eighteenth century it is recorded that experience had shown "that free negroes are an idle, slothful people and prove very often a charge to the place where they are."<sup>1</sup> Therefore, the law of 1714 had a provision designed to prevent freedmen from ever coming upon the township as paupers. It enacted that any master manumitting a slave must enter into "sufficient security," "with two sureties in the sum of 200 pounds," to pay to the negro an annuity of 20 pounds. In case of manumission by will the executors must give such security. Owners or their heirs were obliged to maintain all negroes not manumitted according to law. The desire to save townships the expense of supporting freedmen was not recognized to such an extent as to allow unfortunate negroes actually to suffer. An act of 1769 states

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<sup>1</sup>Law of 1714. Nevill, I, 18.



definitely that if the "owner becomes insolvent and so incapable of providing for his slaves, who shall by sickness or otherwise be rendered incapable of maintaining themselves, they shall be relieved by the township the same as white servants."<sup>1</sup> In 1773, in response to several petitions, a bill providing for manumission without the giving of security was introduced in the Assembly. The bill stated that the manumission law of the Colony had on experience been found too indiscriminate, the requirement of equal security in all cases working, in some instances, to "prevent the exercise of humanity and tenderness in the emancipation of those who may deserve it." In view of the great opposition as well as favor with which the bill was received, the House ordered that the bill be printed and referred to the next session.<sup>2</sup> At the next session, in 1775, the various petitions presented for and against the bill led to another postponement to the following session;<sup>3</sup> by which time the greater interests of the Revolution crowded out the consideration of this matter.

Immediately after the Revolution we find a peculiar form of manumission, that by special act of the legislature. On three occasions previous to the year 1790, slaves that had become the property of the State, through the confiscation of Tory estates, were set free by act of the legislature.<sup>4</sup> The negroes were given their freedom in recognition of past services to the State or to the Federal cause.<sup>5</sup>

<sup>1</sup> Allinson, 315. The law of 1679 reenacted the requirements of the law of 1714.

<sup>2</sup> *Assem. Jour.*, Nov. 30, 1773, to Feb. 16, 1774.

<sup>3</sup> *Assem. Jour.*, Jan. 28 to Feb. 7, 1775.

<sup>4</sup> 1784, 1786 and 1789; 8 Ses., 2 sit., *Statutes*, 110; 11 Ses., 1 sit., *Statutes*, 368; 14 Ses., 1 sit., *Statutes*, 538.

<sup>5</sup> There is record of an interesting case of this form of manumission in 1840. Cæsar Jackson, a colored man of Hackensack, was a slave in law, having been born previously to the year 1804. His late master, Peter Bourdett, had inserted in his will a request that, at his death, the slave Cæsar Jackson should be set free. The heirs of Peter Bourdett desired to carry out his request, but had been unable to do so. They had given

In 1786, changes were made in the law of manumission. Slaves between the ages of twenty-one and thirty-five, sound in mind, and under no bodily incapacity of obtaining a support, might now be emancipated without security being given for their support. A master must first secure a certificate signed by two overseers of the poor of the township and two Justices of the Peace of the county, showing that the slave met the requirements as to age and health. He might then manumit the slave by executing a certificate under his hand and seal in the presence of two witnesses. A similar manumission by will was valid. In all other cases the master (or his executors) was compelled to give security that the negro should not come upon any township for support.<sup>1</sup> These provisions were virtually reenacted in the slave law of 1798.<sup>2</sup> A supplementary law in 1804 provides for registration of instruments of manumission by the county clerk.<sup>3</sup> Such record by the clerk was receivable as evidence in the courts.<sup>4</sup>

The New Jersey courts interpreted the law on manumission in a liberal spirit. They were ready to presume a manumission, if an actual, formal emancipation according to law could not be proven, whenever the circumstances seemed to warrant such a procedure. In 1789, a negro woman who had lived and worked in the neighborhood of Shrewsbury as a free woman for seventeen years, with no claim upon her as a slave,

Cæsar Jackson a lot of land in the township, and he had erected on it a dwelling-house for himself and his family; but he had been unable to obtain a deed for the land, as he was still a slave at law. In view of these circumstances Cæsar Jackson was emancipated by act of the legislature. 64 Ses., 2 sit., *Statutes*, 19. See also *Assem. Jour.*, Jan. 29 to Feb. 17.

<sup>1</sup> Acts of Gen. Assem., 1786.

<sup>2</sup> Paterson, 307.

<sup>3</sup> 29 Ses., 1 sit., *Statutes*, 460. The registration book for Bergen County is entitled "Liber A. Manumition of Slavery." It records: (1) the certificate by two overseers of the poor and two Justices of the Peace; (2) the deed of manumission; (3) the Justice's certificate that the deed is executed voluntarily.

<sup>4</sup> The certificate of health and capacity need now be signed by only one overseer of the poor.

was declared free by the Supreme Court. The court held that the above facts proven were *prima facie* evidence of freedom and would compel the defendant to prove a strict legal property, which he had not done.<sup>1</sup> Similarly, six years later, the court decided that a certain negro woman, who had been promised her freedom by her mistress, and who had lived for ten years as a free woman with the acquiescence of the person claiming her, was entitled to her freedom.<sup>2</sup> Verbal declarations by a master that after his death his slave should be free, as a reward for good behavior, entitled the slave to receive his liberty. In the opinion of the court, these declarations amounted to an actual manumission to take effect on the master's death; or, if they were regarded as proving nothing more than a promise, it was still a promise binding upon the master's executors.<sup>3</sup> A case in 1794<sup>4</sup> shows the limit to which

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<sup>1</sup> *The State vs. Lyon*, *N. J. Law Rep.*, I, 462. A slave woman named Flora had been the property of a certain Dr. Eaton, of Shrewsbury. He had frequently declared that he was "principled against slavery; that he never intended Flora to belong to his estate; nor should any of his children be entitled to hold her as their property." After his death his wife had stated that she had set Flora free. From that time Flora was considered in the neighborhood as a free woman; and lived and worked as such, with no claim upon her as a slave, for seventeen years. During this time she had married a free negro, with whom she had since lived. They had two children whom they had supported by their industry and kept with them until one, Margaret, was seized and forcibly carried away as a slave. The court decided that this Margaret Reap must be set at liberty, as the above facts were not opposed by proof of strict legal property.

<sup>2</sup> 1795. *The State vs. M'Donald and Armstrong*, *N. J. Law Rep.*, I, 382 (Coxe.) A slave had been promised her freedom upon the death of her mistress. From the time this death occurred the negro had lived as a free woman and had worked for herself in various places. She had married a free negro and had three children by him. For ten years the husband of her late mistress acquiesced in the arrangement, but at the end of this period gave to a man a bill of sale for the negro. The court held that these facts were sufficient evidence of the woman's right to her liberty.

<sup>3</sup> 1790. *The State vs. Administrators of Prall*, *N. J. Law Rep.*, I, 4 (Coxe); also Halsted, *N. J. Digest*, pp. 831, 832, sec. 23.

<sup>4</sup> *The State vs. Frees*. *N. J. L. R.*, I, 299 (Coxe.)

the Supreme Court was willing to go on this subject. It was held that mere general declarations of an intention to set negroes free, unaccompanied by any express promise or understanding, were insufficient authority for the court to declare the negroes free.<sup>1</sup>

In 1793, we find a very liberal interpretation of the law when the court ignores the legal requirement of security. A certain slave owner had, by will, manumitted all his slaves. One, a boy, could not be considered as manumitted until the administrators had given the security required by law. Instead of giving security they united with the heirs in selling the boy. The court decided that the boy was entitled to his freedom whether the administrators had given the security or not.<sup>2</sup>

Slaves left by will to be sold for a term of years and then be free, were held to be free from the time of sale. As soon as sold they were merely servants for a term of years and no longer slaves. Any children born to them during the period of service were free.<sup>3</sup>

The authority of the act of 1798 was judicially established in 1806. The supreme court declared that instruments of manumission must be executed conformably to that law.<sup>4</sup> Again in 1842, in a case to prove legal settlement,<sup>5</sup> it was

<sup>1</sup> If a master had made a contract with his slave for his freedom and the terms had been fully complied with, the negro was entitled to his freedom although afterwards sold by his master. Halsted, *N. J. Digest*, pp. 831, 832, sec. 26.

<sup>2</sup> *The State vs. Pitney*. *N. J. Law Rep.*, I, 192 (Coxe.)

<sup>3</sup> 1790. *The State vs. Anderson*. *N. J. Law Rep.*, I, 41.

<sup>4</sup> *The State vs. Emmons*. *N. J. Law Rep.* (1st Pennington, 3rd ed., pp. 6-16). The counsel for the State endeavored to establish a distinction between emancipation as it respects the owner, and emancipation as it respects the State. He argued that so far as the master was concerned any kind of manumission might be valid, but at the same time be void so far as it affected the government. The court held that "slavery was an entire thing;" that a negro could not be considered as at once slave and free.

<sup>5</sup> *The Overseers of the Poor of Perth Amboy vs. The Overseers of the Poor of Piscataway*. *N. J. Law Rep.*, XIX, 173-181 (4th Harrison).



held that "a deed of manumission although acknowledged and recorded, was not valid unless executed in the presence of at least two witnesses"<sup>1</sup> as the act of 1798 required.<sup>2</sup>

*Rights and Privileges of Slaves and Free Negroes.*

The protection of slaves from ill-treatment by their masters received some attention in New Jersey legislation. As early as 1682, in the Proprietary Colony, one section of a "Bill for the general laws of the Province of East New-Jersey" provides "that all masters and mistresses having negro slaves, or others, shall allow them sufficient accommodation of victuals and clothing."<sup>3</sup> Queen Anne's instructions to the first royal governor, Lord Cornbury, required him to endeavor to get a law passed protecting servants and slaves from "inhuman severity" on the part of their masters. The "Instructions" directed that this law should provide capital punishment for the "willful killing of Indians and negroes" and a suitable penalty for the "maiming of them."<sup>4</sup> Again, in the early legislation of the State, one of the reasons given for the enactment of the slave law of 1786 was "that such [slaves] as are under servitude in the State ought to be protected by law from those exercises of wanton cruelty too often practiced upon them." Any person "inhumanly treating and abusing" his slave might be indicted by the grand jury, and on conviction might be fined.<sup>5</sup>

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<sup>1</sup> There had been many instances in which deeds of manumission had been executed conformably to law in every respect, excepting that there had been but one witness. These manumissions were made valid by a special act of the legislature in 1844 (68 Ses., 2 sit., *Statutes*, 138).

<sup>2</sup> In a case of postponement of a trial by *habeas corpus* the defendant was ordered to enter into recognizance to produce the negro at the future trial and, in case of adverse judgment, to pay for the services of the negro during the intervening time. Halsted's *Digest*, p. 831, sec. 21. In another case the defendant was ordered to enter into recognizance not to send the negro out of the State (Halsted's *Digest*, p. 831, sec. 22).

<sup>3</sup> L. and S., 237.

<sup>4</sup> *Ibid.*, 640-642.

<sup>5</sup> Laws of N. J., 1786. This provision was repeated in the law of 1798.

The owner<sup>1</sup> of a slave was held in law obliged to support the slave at all times, provided that the negro had not been legally manumitted. If the master became insolvent and so unable to provide for his slave, the negro, if unable to maintain himself, was treated as a pauper. Any person, "fraudulently selling an aged or decrepit slave to a poor person unable to support him," was liable to punishment by a fine of \$40.<sup>2</sup> A master who had disclaimed all responsibility for the support of his slave could not be held liable to a third person for the negro's maintenance.<sup>3</sup> Yet, if the overseer of the poor had found the slave in actual want, it would have been his duty to give immediate relief, and then recover from the master.

The value and need of some amount of education for slaves was recognized soon after the establishment of the State government. The law of 1788 provided that all slaves and colored servants for life or years, born after the publication of the act, should be taught to read before they reached the age of twenty-one years. Any owner failing to supply this instruction was to forfeit the sum of five pounds.<sup>4</sup>

<sup>1</sup> After the master's death the heirs were held responsible for the slave's support. *Chatham vs. Canfield*, *N. J. Law Rep.*, VIII, 63-65, decided what circumstances were sufficient proof of a testator's ownership of a slave to make the executors liable for the negro's maintenance (1824.)

<sup>2</sup> Law of 1798. Paterson, 307.

<sup>3</sup> 1840. *Force vs. Haines*, *N. J. Law Rep.*, XVII, 385-414 (2nd Harrison.) Force had refused to support his slave, an infirm and helpless cripple. Elizabeth Haines, having maintained the negro for several years, finally sued Force for the cost of "board, clothing, and necessities furnished for his slave."

<sup>4</sup> Acts of 13th. Gen. Assem. The provision was reenacted in the law of 1798.

At first sight this fine might seem trifling; but it was probably quite sufficient to be a severe penalty, considering the small charge made for teaching at the time. School bills given by Mr. Mellick show how low the charges were. Christopher Logan had a bill against the "Estate of Aaron Mellick Dec'd," "To Schooling Negro boy Joe 61 days \$1.39;" later "Wm. Hambly, teacher," charges "\$4.16 for 159 days Schooling." (*Story of an old Farm*, p. 608.)

All black men were presumed to be slaves until the contrary appeared, as has been shown earlier in this paper.<sup>1</sup> The Supreme Court held to this position even as late as 1826, when the free negroes numbered twice as many as the slaves, and only receded from it ten years later when the injustice of the ruling had become very evident. Nevertheless, the court early decided that any person claiming a particular negro as a slave must prove a good title to him.<sup>2</sup> A negro thus claimed need not prove himself absolutely a freeman in order to obtain his liberty. If he disproved the right of the person who claimed him, that was sufficient. That the negro had been actually held as property and had acquiesced in the arrangement was no proof of a good title.

In most cases at law no slave might be a witness. He was allowed to testify in criminal cases when his evidence was for or against another slave.<sup>3</sup> The presumption of slavery arising from color must be overcome before a negro could be received as a witness. A slave might not be a witness even to show whether he were bond or free. His declarations on that point might not legally be accepted as evidence.<sup>4</sup> That a negro was reputed free from childhood, or had lived to all intents and purposes as a freeman for more than twenty years, the courts decided was sufficient proof to overcome the presumption arising from color, and permit the negro to be admitted as a witness.<sup>5</sup> Free negroes, therefore, were commonly received as witnesses.

In 1760<sup>6</sup> the enlistment of slaves, without the express permission in writing of their masters, was forbidden. This provision evidently was caused, not by prejudice against the negro, but by unwillingness to deprive masters of the services

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<sup>1</sup> *Supra*, p. 34.

<sup>2</sup> 1795. *The State vs. Heddon*. *N. J. Law Rep.*, I, 377.

<sup>3</sup> Acts of 1714 and 1798.

<sup>4</sup> 1826. *Fox vs. Lambson*, *N. J. Law Rep.*, VIII, 339-347.

<sup>5</sup> *Ibid.*, and *Potts vs. Harper*, *N. J. Law Rep.*, III, 583.

<sup>6</sup> *Nevill*, II, 267.

of their slaves. The occasion of the prohibition was the raising of one thousand volunteers for a campaign against Canada in the French and Indian War. To what extent negroes in New Jersey took part or aided in the Revolution it is difficult to determine. A law of 1780 for the recruiting of the remainder of New Jersey's quota of troops for the service of the United States forbids the enlistment of slaves.<sup>1</sup> The following year a law for the same purpose repeats the prohibition.<sup>2</sup> Yet slaves from New Jersey served, in various capacities, both the State and the Federal Government during the war. Two instances are recorded when a slave was manumitted by act of legislature as a reward for faithful service of the Revolutionary cause. Peter Williams, a slave who belonged to a Tory of Woodbridge, having been taken within the British lines by his master, escaped through them in 1780. He served for some time with the State troops and later enlisted in the Continental army, serving there until the close of the war. When his master's estate was confiscated he became the property of the State, and, in 1784, was set free by an act of the legislature.<sup>3</sup> Five years later a slave named Cato, part of the confiscated estate of another Woodbridge Tory, received his freedom in the same manner. The act declared that Cato had "rendered essential service both to this State and the United States in the time of the late war."<sup>4</sup>

In the Colonial period freedmen were denied the right to hold real estate. The law of 1714 enacted that no negro, Indian, or mulatto thereafter manumitted should hold real

<sup>1</sup> 5th Assembly, *N. J. Laws*.

<sup>2</sup> Wilson, 209.

<sup>3</sup> 8 Ses., 2 sit., *Statutes*, 110; *Assem. Jour.*, Aug. 30 to Sept. 1, 1784.

<sup>4</sup> 14 Ses., 1 sit., *Statutes*, 538; *Assem. Jour.*, Nov. 13-25, 1789. In 1786 another negro, named Prime, the property of the State, was emancipated by special statute. He had formerly been the slave of a Tory of Princeton. No specific reason was given for this action other than, that "the legislature was desirous of extending the blessings of liberty and the said negro Prime hath shown himself entitled to their favorable notice." 11 Ses., 1 sit., *Statutes*, 368.



estate "in his or her own right, in fee simple or fee tail" but the same should "escheat to her Majesty, her heirs and successors."<sup>1</sup> A free negro was entitled to vote in the State during the early years. The suffrage was not confined to whites by the constitution adopted in 1776.<sup>2</sup> Article IV states that "all inhabitants of this Colony, of full age, who are worth fifty pounds . . . and have resided within the county" for twelve months, are entitled to vote.<sup>3</sup> A new constitution in 1844 limited the elective franchise to whites.<sup>4</sup>

The provision for allowing free negroes to gain a legal settlement is of interest, because upon legal settlement depended the responsibility of a township for the support of its colored paupers. A manumitted slave had a legal settlement in the place where his master's legal settlement was.<sup>5</sup> The children of slaves born free were deemed settled in the township in which they were born; but might gain a new settlement in the same manner as whites, or in any township where they had served seven years.<sup>6</sup> No slave whose master had not become insolvent could gain a legal settlement in any township.<sup>7</sup> This inability of slaves to acquire a settlement was

<sup>1</sup> Nevill, I, 18.

<sup>2</sup> Poore's *Collection*. Wilson, *Acts* (1776-1783).

<sup>3</sup> In 1793, as proof of the illegality of an election for fixing on a site for the Middlesex County jail and court house, it was stated that "a negro man was admitted to vote, who had no legal residence, and his declaration that he had been manumitted in another State was received as sufficient proof of his being entitled to vote." The implication here is that a negro able to show clear proof of his freedom, and having a legal residence, was entitled to vote. The *State vs. Justices, etc., of Middlesex*, *N. J. Law Rep.*, I, 283, 284 (Coxe).

<sup>4</sup> Poore's *Collection*, 1315.

<sup>5</sup> *Law of 1798*. Paterson, 307.

<sup>6</sup> 1820. 44 Ses.; *Statutes*, 166.

<sup>7</sup> 1824. *South Brunswick vs. East Windsor*, *N. J. Law Rep.*, VIII, 78-83 (3rd Halsted).

As has been shown, *Supra*, pp. 45 and 51, a helpless slave was not allowed to suffer because his master was able to maintain him and yet refused to do so. It was the duty of the overseer of the poor of the township where such a slave happened to be, to give relief and then recover from the owner if possible.

established in several cases carried to the Supreme Court, where one township endeavored to prove the legal settlement of a destitute negro in another township, and then to shift the burden of his support.<sup>1</sup> It is the latest form in which I have found the influence of slavery traceable in New Jersey law.

### *Social Condition of Slaves.*

The use of slave labor was, in the eighteenth century, very general in the eastern portion of New Jersey. Interesting information on the social condition of slaves is afforded by advertisements in newspapers<sup>2</sup> published during the Colonial period and in the early years of the State. Male slaves were employed as farm laborers of all sorts, stablemen, coachmen, stage drivers, sailors, boatmen, miners, iron workers, saw-mill hands, house and ship carpenters, wheel-wrights, coopers, tanners, shoemakers, millers, bakers, cooks, and for various kinds of service within the house or about the master's person. Slave women were employed at all kinds of household service, including cooking, sewing, spinning and knitting; and as dressing maid, barber, nurse, farm servants, etc. If a woman had children she was rendered less desirable as a slave. That the laxness of morals ordinarily found among African slaves was present in New Jersey is sufficiently evident.<sup>3</sup> Frequently slave women were offered for sale for no other reason than that they had children. They were, in some cases, sold without their child.

<sup>1</sup> 1824. *South Brunswick vs. East Windsor.*

1842. *Overseers of the Poor of Perth Amboy vs. Overseers of the Poor of Piscataway, N. J. Law Rep., XIX, 173-181 (4 Harrison).*

1857. *Overseers of Morris vs. Overseers of Warren, N. J. Law Rep. (2 Dutcher, 312).*

<sup>2</sup> The *Newark Centinel of Freedom*, the *Trenton True American* and excerpts from the Colonial journals published in *N. J. Ar.*, XI and XII.

<sup>3</sup> See *The State vs. Anderson, N. J. Law Rep., I, 41*, and *The State vs. Mount, N. J. Law Rep., I, 337.*

The newspapers contained many notices of reward for the return of fugitive slaves. In some cases the returned fugitive seems to have been treated very leniently. One instance is recorded in which he received no punishment whatever.<sup>1</sup> In another case the advertisement promises that if he "shall return voluntarily, he shall be forgiven, and have a new master."<sup>2</sup> Slaves of both sexes and various ages were among the fugitives. A man fled and left behind a wife and child. A woman with a child of nine months ran away. Slaves occasionally escaped by the ferries from Elizabeth-Town and Perth Amboy to New York.<sup>3</sup> In 1734, three were thought to have gone off in a canoe toward Connecticut and Rhode Island. Others attempted to get on board some vessel, or sought a chance to go privateering. A slave sometimes escaped on the back of his master's horse.

Negroes were frequently sold for a term of years. Slaves were at times hired out by their masters ;<sup>4</sup> occasionally a plantation together with the negroes to cultivate it was rented, or a mine with the slaves to work it.<sup>5</sup> A negro indented servant is mentioned in 1802. In 1794, a slave was given as a donation to the Newark Academy to be sold for as much as he would bring.<sup>6</sup> The Rev. Moses Ogden bought him for fourteen pounds. Mr. Atkinson states that this clergyman owned a number of slaves whom he employed to work his farm lands.<sup>7</sup> The slave's position as a chattel is brought out clearly in many advertisements of sales where slaves are classed with horses, cattle, farming utensils and household goods.<sup>8</sup>

<sup>1</sup> *Centinel of Freedom*, VI, No. 34.

<sup>2</sup> *Ibid.*, IV, 45.

<sup>3</sup> *Supra*, p. 34.

<sup>4</sup> *Centinel of Freedom*, VI, No. 14.

<sup>5</sup> *N. J. Ar.*, XII, 186, 251.

<sup>6</sup> Atkinson, *History of Newark, N. J.*, 170-172.

<sup>7</sup> Moses Newell Combs, another Newarker of the same period, was a representative of the anti-slavery sentiment. He was noted for the free school which he established for his apprentices, but also advocated zealously the emancipation of slaves. This latter principle he himself put into practice by manumitting a negro that he owned (Atkinson, 148).

<sup>8</sup> For example, the notice of the sale of a farm at Elizabeth, in 1801, reads: "On the above farm is also to be sold a negro man with four children, a horse, chair, cows, and farming utensils" (*Centinel of Freedom*, VI, 11).

Slaves were, on the whole, well treated in New Jersey. In most cases, they lived in close personal relations with the master's family and were regarded by him as proper subjects for his care and protection. As early as 1740 there is record of a slave that could read and write.<sup>1</sup> Frequently slaves spoke both English and Dutch.<sup>2</sup> Many slaves played the violin with considerable proficiency. Under the Colonial laws, it is true, slaves accused of crime received severe treatment; but this severity must be viewed as part of the criminal law of an eighteenth century Colonial society, stern both from its origin and from its individual development.

Mr. Mellick, in his "Story of an old Farm," gives a very entertaining description of slavery on a farm at Bedminster in Somerset County. The first negro purchased was a picturesque creature of somewhat eccentric habits. He was a "master-hand at tanning, currying and finishing leather;" and, indeed, these accomplishments were the attractions that overcame the scruples of the family against slave-holding, at a time when there was great need of help in the tannery. The slaves of the farm were granted their holidays and enjoyments. In the week following Christmas they generally gave a party to which the respectable colored people of the neighborhood were invited. The whole week was one of great festivity, and but little work was expected of the blacks. Again, the day of "general training" (usually in June), was another great holiday for these slaves. This drill of the militia was regarded as a kind of fair and was a time of great sociability. The family negroes all attended in a large wagon, taking with them root beer and ginger cakes to offer for sale.

Mr. Mellick gives copies of bills for the schooling<sup>3</sup> of the negro children, showing that in this family the law that slaves should be taught to read was well observed. When the farmer died, his will disposed of the negroes so that those who did

<sup>1</sup> *N. J. Ar.*, XII, 51.

<sup>2</sup> *N. J. Ar.*, XI, 209; XII, 102, 306.

<sup>3</sup> *Supra*, p. 51, note.



not remain on the old farm were comfortably placed with friends of his. The boys and girls were sold for terms of years merely. This shows a considerate interest in the happiness of slaves, together with a consistent regard for the welfare of his family.<sup>1</sup>

Slavery was very evidently an institution in New Jersey life. During the eighteenth century especially, the use of slave labor became very common in many sections. Yet, in other parts, during the same period, an anti-slavery sentiment was growing, the strength of which was shown when the Friends in 1776 denied the right of membership in their Society to slave holders. The anti-slavery movement progressed steadily, after the Revolution largely under the leadership of the abolition societies. Its influence toward practical ends is seen in the extinction of the slave trade; in the activity of various philanthropic men in securing to negroes their rights before the courts; and, later, in the gradual emancipation begun in 1804.

After the gradual abolition of slavery in New Jersey had been secured by law, the local anti-slavery movement merged into the larger agitation going on throughout the nation. The resolutions of the legislature in 1824, 1847, and 1849 show that the people of New Jersey early recognized the connection of the institution of slavery with national interests.

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<sup>1</sup> Mellick, A. D., *Story of an Old Farm*, pp. 602-612.

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**XI-XII**

**CAUSES OF THE MARYLAND REVOLUTION OF 1689**





JOHNS HOPKINS UNIVERSITY STUDIES  
IN  
HISTORICAL AND POLITICAL SCIENCE

HERBERT B. ADAMS, Editor

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History is past Politics and Politics are present History.—*Freeman*

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FOURTEENTH SERIES.

XI-XII

CAUSES OF THE MARYLAND REVOLUTION OF 1689

BY FRANCIS EDGAR SPARKS, A. B.

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# CONTENTS.

	PAGE
CHAPTER I. INTRODUCTION . . . . .	7
CHAPTER II. THE CONSTITUTION OF MARYLAND, 1658 . . . . .	10
Introductory . . . . .	10
The Proprietor . . . . .	11
The Governor . . . . .	12
The Council . . . . .	14
The Assembly . . . . .	15
The Judicial System . . . . .	17
Land . . . . .	18
Taxation . . . . .	21
The Currency . . . . .	23
The Militia . . . . .	23
Religion . . . . .	24
The Secretary . . . . .	24
The Surveyor General . . . . .	25
The Muster Master General . . . . .	25
The Sheriff . . . . .	25
The Constable . . . . .	26
The Coroner . . . . .	26
CHAPTER III. THE MARYLAND PALATINATE . . . . .	27
CHAPTER IV. CONSTITUTIONAL HISTORY OF MARYLAND, 1658-1689 . . . . .	30
The Restoration of the Proprietary Government and Fendall's Rebellion . . . . .	30
The Period of Resistance, 1660-1670 . . . . .	35
The Period of Submission, 1670-1676 . . . . .	50
The Rebellion of 1676 . . . . .	64
The Struggle between the Proprietor and the Assemblies, 1676-1684 . . . . .	75
The Calm before the Storm, 1684-1689 . . . . .	93
The Revolution of 1689 . . . . .	99
BIBLIOGRAPHY . . . . .	109





# CAUSES OF THE MARYLAND REVOLUTION OF 1689.

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## CHAPTER I.

### INTRODUCTION.

The Maryland Revolution of 1689 has always been the source of much trouble to Maryland historians. They are at a loss to explain how it was possible for a few men to upset the Proprietary government with such ease when, as they maintain, that government was universally beloved by the people. With (according to their statements) no serious disorders for thirty years, good and efficient administration, a popular Proprietor, religious liberty and good laws, it is puzzling to see why Maryland should have rebelled against the Proprietary government. But it is not true that such a happy condition of affairs existed either in 1689 or in the thirty years preceding. It is the truth of this statement that it is our intention to prove.

What then were the causes of the revolution? It is usually said that the people were deceived by a few men into a belief of a plot by the Catholics to massacre the Protestants by means of a pre-arranged Indian invasion. The alarm caused by this rumor occasioned an armed uprising under these men, and they used the power thus acquired to overthrow the Proprietary government that they might aid their personal ambitions and interests.

The fault of this explanation is that it does not explain. If the great mass of the people were devotedly attached to the Proprietor, and that Proprietor's government was so prosperous and happy, it is difficult to believe that a handful of men of no reputation could overthrow that government by an Indian scare and with but little resistance.

The real causes of the revolution lie deeper than this. They are the outgrowth of the thirty years preceding 1689, and are to be traced in the history of that period, which has never been given the proper amount of attention; its constitutional side has been almost entirely neglected. The whole interval has been disposed of in a very few pages. This is the happiest period of Maryland's colonial history, it is said, and as "those nations are happiest that have the least history," the uneventful nature of the period is supposed to be fully explained.

The Proprietor's residence in the colony during much of this period is cited as a reason of the colony's tranquillity and happiness. The actual residence of the Proprietor in the province was indeed a test of the Palatinate organization of the government. That it was such a successful test is quite another matter and cannot be so freely affirmed. This period was that of the most thorough organization of the Palatinate system ever attempted in America, and here, as in the Carolinas and New Jersey, the system seems not to have been what the people desired. Indeed it is this system that is attacked by the revolution more than anything else.

The Palatinate form of government—taxation, the interference of the Proprietor in the election of the Assembly and his forcing legislation and disregard of the same, the filling of administrative, judicial and legislative offices by the same persons, the favoritism shown to relatives of the Proprietor, his attempts to regulate fees, and harsh treatment of those in opposition—were complained of by the colonists, as will be shown. That the immediate cause alleged, namely, the opposition of the Proprietary government to the claims of William of Orange and its support of James II., was true, there can scarcely be a doubt.

The attempt will also be made to show that Maryland has been greatly influenced by the events occurring in Virginia and England. The influence of Virginia is especially marked. Bacon's Rebellion, the arbitrary government in Virginia, the rumors of Papist plots, the resistance to

the introduction of Roman Catholicism in both England and Virginia, the famous English Popish Plot, and the English Revolution of 1688, all affected the course of events in Maryland.

The period extending from 1658 to 1689 is the object of our consideration. It is necessary to inquire first what was the constitution of Maryland in 1658 before proceeding further.



## CHAPTER II.

### THE CONSTITUTION OF MARYLAND, 1658.

*Introductory.*—The era of Maryland history extending from its settlement to 1658 was one of continual change and experiment. The constitution of the Assembly and Council, the powers of the Governor and other officers, were never fixed, and the constitutional structure varied continually. The colony had fallen on evil days. The great contest of Crown and Parliament was on the eve of breaking out in England when the foundations of the Maryland colony were laid. Until 1658 this contest was the cause of frequent disturbances in Maryland. The disturbances caused by Claiborne and Ingle, the jealousy of Virginia, the weakness of the colony, and its disputed title, had all been disturbing factors. In 1650 the Virginia Puritans migrated to Maryland, and a few years later they overthrew the Proprietary government and established a government similar to the then existing English Commonwealth. This revolutionary government lasted, however, but a few years, Lord Baltimore having gained the good-will of Cromwell. In 1658 the government of Maryland was firmly established by Cromwell's directions, and the constitutional structure at last attained a point of stable equilibrium.

At the beginning of the colony the Proprietor had proposed a series of laws to be passed by the Assembly.<sup>1</sup> The Assembly refused to accept these as laws;<sup>2</sup> but, from the character of the laws it did consent to pass, we may believe them to have embodied practically the ideas of the Proprietor. The system of government established was that of the County Palatinate, having all that is characteristic of that system. Many of the provisions were never put into

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<sup>1</sup> I. Assem. 6.

<sup>2</sup> I. Assem. 9.

effect, especially those creating differences in rank and privilege. Twenty years of actual existence caused many modifications. A certain governmental system gradually evolved. What was the constitution of the colony in 1658?

*The Proprietor.*—By the terms of the charter granted to Lord Baltimore, the Proprietor was to hold the grant in free and common socage and with all the rights and privileges “as any Bishop of Durham in our kingdom of England ever heretofore had held, used or enjoyed, or of right ought or could have, use or enjoy.” This made the Proprietor a Palatine—a subject to be treated later. The powers of the Proprietor at this period were the same as given him in the charter, with but few modifications. The most important of these was the resignation by the Proprietor of his right to initiate all legislation, but through the Council, or more directly, he presented the laws he wished to have passed. The veto right was retained by him, and it could be exercised at any time after the passage of a law. He had also the control of elections and representation. He fixed the time and place of meeting, the time of adjourning and proroguing the Assembly.<sup>1</sup> He could make ordinances not affecting the rights of “freeholds, goods or chattels.” No laws, however, could be contrary to reason, and all were to be as near as possible to the laws of England.

The Proprietor could create and fill offices, incorporate towns and ports of entry, hold courts of justice, inflict punishment of life and limb, pardon offenses, set off counties and local divisions, collect customs duties if laid with consent of the Assembly, make war against Indians or other internal enemies by land or sea, raise and maintain troops, appoint officers for the militia, fortify his possessions, and declare martial law whenever he thought it necessary. The Proprietor could grant land in fee-simple, fee-tail, for life, lives, or years, to be held by such customs, rents or services as he chose. The statute of *Quia Emptores*,<sup>2</sup> which forbade subinfeudation in England, was not to apply in Maryland.

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<sup>1</sup> I. Assem. 259, 243, 369, etc.

<sup>2</sup> 18 Edward I.

All writs, mandates and proclamations were issued in the Proprietor's name. Everything was the Proprietor's. He was more a sovereign in Maryland than the king was in England. Such privileges as granting "titles of honor not used in England" were not exercised, and attempts to create a class of Lords of Manors were only fairly successful. The Proprietor transmitted most of these powers, except his veto, to officers in the colony, but he always maintained an oversight of all that was done.

*The Governor.*—The Governor was appointed by the Proprietor and was his deputy, as shown by the title "Lieutenant-General," by which the Governor was usually called.<sup>1</sup> As deputy he had the general powers of the Proprietor, having full executive powers in peace or war. Possessing such great powers, the Governor was generally a member of the Calvert family, as indeed were many other high officers of the colony, although occasionally some prominent resident of the colony was chosen Governor, as in the case of 1658.

Up to this period the Proprietor had not, for any considerable time, played the rôle of absolute Governor. The earlier commissions to the Governors stated in the fullest manner their powers and duties.<sup>2</sup> It was now stated that the appointed Lieutenant General was to have all the powers and privileges that the Lieutenant General preceding him had enjoyed.<sup>3</sup> The commission was read in the Council and recorded by the Secretary, who then took the Governor's oath of allegiance to the Proprietor.<sup>4</sup>

The commission created him Lieutenant General, Chief Governor, Admiral, Chief Captain and Commander on land and sea, Chancellor, Chief Justice and Chief Magistrate.<sup>5</sup> He could veto any law, and his assent was necessary to make a law valid.<sup>6</sup> He could not assent to any law repealing a law already, or to be enacted by the Assembly and to which

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<sup>1</sup> I. Council, 49, 109, 152, 160, 202, 323.

<sup>2</sup> I. Council, 49, 151, 201. <sup>3</sup> I. Council, 323. <sup>4</sup> I. Council, 209, 330.

<sup>5</sup> I. Council, 202, 203.

<sup>6</sup> I. Council, 203.

the Proprietor had assented, nor to any law establishing or changing any officer.<sup>1</sup> He could not give his assent to any law imposing fines, forfeitures or confiscations to be paid to any but the Proprietor, nor to any law concerning religion, the establishment of parishes, payment of tithes, oaths to be taken by the people, treasons, matters of judicature, or anything which might infringe upon or prejudice the rights or prerogatives of the Proprietor.<sup>2</sup> Any such laws required a special warrant from the Proprietor.<sup>3</sup>

The Governor presided as Chief Justice over the Provincial Court and could grant pardon for any offense except treason.<sup>4</sup> He was empowered by his commission to propound and prepare wholesome laws and ordinances for the Assembly, and also to issue in the Proprietor's name "ordinances, edicts and proclamations," with penalties not extending to loss of life, limb or property.<sup>5</sup> He also published all laws.<sup>6</sup> He designated the public ports and the officers there to be employed, as also the places and dates for the holding of markets and fairs.<sup>7</sup> He was keeper of the Great Seal, and granted all writs, processes and commissions for the execution of justice, the dividing and bounding of lands, licenses, and all public deeds and acts whatsoever.<sup>8</sup> He could nominate two or three councillors, subject, however, to the confirmation of the Proprietor.<sup>9</sup> Nearly all of the subordinate officials were appointed directly by him. He was commander-in-chief of the militia, and as such appointed all subordinate military officers. The Governor held his office at the pleasure of the Proprietor and could be superseded by another appointee at any time.<sup>10</sup> He could appoint an acting Governor whenever he was absent or dying. Such appointments often occurred.<sup>11</sup> If the Governor died or withdrew from the colony without naming an

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<sup>1</sup> I. Council, 203.<sup>2</sup> I. Council, 203, 204.<sup>3</sup> I. Council, 204.<sup>4</sup> I. Council, 203, 205, 206, 207.<sup>5</sup> I. Council, 203, 205.<sup>6</sup> I. Council, 204.<sup>7</sup> I. Council, 205.<sup>8</sup> I. Council, 205.<sup>9</sup> I. Council, 208, 323.<sup>10</sup> I. Council, 202, 323.<sup>11</sup> I. Council, 160, 207, 241, 255, and many others.



acting Governor, the Council could elect such an officer, but he must be a member of the Council and reside in Maryland.<sup>1</sup> This point had once been the cause of some contention.<sup>2</sup> The salary of the Governor appears to have been paid by the Proprietor.<sup>3</sup> The amount cannot be stated, nor do we know just how it was paid. Sometimes the Assembly made an especial gift or grant to the Governor.<sup>4</sup> Usually in this early period he was given a large grant of land by the Proprietor.

*The Council.*—The members of the Council were appointed by the Proprietor and held office at his pleasure.<sup>5</sup> The Secretary was a member *ex officio*, and so was the Governor, who presided. The Surveyor General was usually a member. The number of the Council at this date (1658) was about ten, although previously it varied from six to ten and was never fixed.

New commissions to councillors were generally issued whenever a new commission was issued to a Governor. The oath of allegiance to the Proprietor was administered to the Council by the Governor in a formal meeting.<sup>6</sup> All meetings were subject to the call of the Governor. The Council was advisory, legislative and judicial. As an advisory body it assisted the Governor in the execution of the laws, the appointment of officers, and on questions of war and peace. It was virtually the cabinet of the Governor. As a legislative body it acted from this time as an Upper House, and its consent was necessary to every law. Prior to 1650 the members of the Council had been also members of the Assembly, which, with the exception of the session of 1646, had only one house. The united opposition of the Council to any bill might not prevent its passage nor insure the veto of the Governor. The Puritans had only one house during their term of power, but the Assembly in 1658 returned to the division into two houses, which has never since been changed.

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<sup>1</sup> I. Council, 207.<sup>2</sup> I. Council, 188.<sup>3</sup> I. Assem. 416.<sup>4</sup> I. Assem. 296.<sup>5</sup> I. Council, 211, 212.<sup>6</sup> I. Council, 213.



With the Governor, the Council, without the assent of the Assembly, could pass ordinances not affecting the life, liberty or property of freemen. By this power the Council established counties<sup>1</sup> and hundreds, imposed embargoes and remodeled public offices.

As a judicial body the Council at first dealt with all legal questions, but by this time it considered, in the first instance, only the more important cases, as the Provincial Court, of which the Governor was *ex officio* chancellor. It also sat as a Court of Appeals, where all cases of importance were sure to come. It also sat as a Court of Chancery and as a Court of Admiralty. The Council, with the Governor, levied assessments on the colonists in accordance with acts passed by the Assembly.

*The Assembly.*—The Assembly until 1650 had been unicameral, although an Upper House is mentioned in 1646.<sup>2</sup> Except during this session, the Governor, the Council, and the freemen, or their representatives, had sat in one house until 1650, when the Assembly was divided into two houses.<sup>3</sup> Under the rule of the Puritan Commissioners, the Assembly had been composed solely of the representatives of the freemen, for there was neither Proprietor nor a Proprietor's Council during this period. When the Proprietor regained his power, his Council was restored and resumed its position as the Upper House of the Assembly. The division of the Assembly may, therefore, in one sense be regarded as continuous from 1650, although it was not fully established until 1658. The Assembly had three branches—the Governor, the Council, and the representatives of the freemen.

The Governor summoned the Assembly whenever he thought fit, although triennial Assemblies had early been desired,<sup>4</sup> and the Puritans had passed a law to that effect.<sup>5</sup> Writs for the election of members were issued by the Governor "by the advice and consent of the Council."<sup>6</sup> These

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<sup>1</sup> I. Council, 308.

<sup>2</sup> I. Assem. 209.

<sup>3</sup> I. Assem. 272.

<sup>4</sup> I. Assem. 75.

<sup>5</sup> I. Assem. 341.

<sup>6</sup> I. Assem. 381.

writs were addressed to the sheriffs of the different counties,<sup>1</sup> directing them to assemble their respective freemen and elect burgesses for the Assembly, and by a fixed time make return of writs to the Secretary's office.<sup>2</sup> The Governor then issued a proclamation summoning the Assembly to meet at a certain time and place. The members of the Upper House were summoned by special writs addressed to each member.

When the Assembly met and organized, a Speaker was chosen by the Lower House,<sup>3</sup> and he was approved by the Governor. The Clerk and other officers of the Lower House were appointed by the Governor. The Secretary was the Clerk of the Upper House.

In the early Assemblies (for example those of 1638, 1640, 1642) the quorum had been fixed at ten members,<sup>4</sup> but now it was a majority of the members chosen. Any member absenting himself without giving sufficient reasons for so doing was fined.<sup>5</sup> As far as possible the procedure and customs of the English House of Commons were followed by the Lower House in Maryland. In the Upper House the Governor presided. It was composed of the Secretary, the Surveyor General, and the councillors summoned by special writ.<sup>6</sup>

The Proprietor had relinquished his claim to initiate all legislation, but he still presented laws to the Assembly for its approval,<sup>7</sup> and they were often passed. The Proprietor could withhold his assent from an act indefinitely, or he could veto any act. He was thus able to nullify legislation whenever it pleased him. The Governor could prorogue and dissolve the Assembly, though it had once declared that it should only be prorogued or adjourned by its own consent,<sup>8</sup> and on another occasion had protested against the exercise of these powers by the Governor.<sup>9</sup> When the Proprietor was present he exercised all the powers of the Governor. He presided in the Upper House, and forced the

<sup>1</sup> I. Assem. 260, 369.

<sup>2</sup> I. Assem. 381.

<sup>3</sup> I. Assem. 261.

<sup>4</sup> I. Assem. 91.

<sup>5</sup> I. Assem. 274.

<sup>6</sup> I. Assem. 202, 381.

<sup>7</sup> I. Assem. 275, 278.

<sup>8</sup> I. Assem. 117.

<sup>9</sup> I. Assem. 180.

passage of such legislation as he wished, or defeated any measure displeasing to him. The Upper House was composed of the Proprietor's creatures and did whatever he wished. The Governor disputed the right of the Lower House to expel any of its members.<sup>1</sup> The expenses of the delegates were generally levied upon their respective counties.<sup>2</sup> St. Mary's City was the usual place of meeting.

*The Judicial System.*—This comprised the Provincial Court, the Court of Chancery, the Admiralty Court, the Council as a Court of Appeals, and the County Courts. These courts, with the exception of the County Courts, which had small powers, were composed of nearly the same members. The Provincial Court, sitting also sometimes as a Court of Chancery and sometimes as an Admiralty Court, is the court here to be considered. The members belonged to the Council, which included all the chief officials of the provincial government. Thus the Council, itself the creation of the Proprietor, combined the executive, judicial and a large part of the legislative functions. The Governor presided over this court as chief justice, chancellor, or admiral. In his absence the councillor next in commission presided. Before this court nearly all cases came, either in the first instance or on appeal from the county courts. For the county and city of St. Mary's, it was the court of first instance for all causes, civil, criminal and testamentary; and for the rest of the province for all causes testamentary, all the more serious criminal offenses, and all civil actions involving property to the value of 1200 pounds of tobacco. All other causes could be appealed to it from the county courts. The judges were sworn to give judgment according to the laws of the province. Where these were silent, the laws of England were supposed to be followed. From this court, appeals could be taken to the Council, sitting as the Upper House of Assembly, upon writs of error. This was often done. It often heard charges against citizens for sedition and bound

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<sup>1</sup> I. Assem. 271.<sup>2</sup> I. Assem. 284.

them over to the Provincial Court. Charges of misconduct of officials were heard, and a great number of cases, especially those concerning land, came before it in the form of petitions for final settlement.

The county courts had very limited powers. Civil causes not amounting in value to 1200 pounds of tobacco, and criminal causes not extending to life or member, were tried by them, but appeals could be always taken to the Provincial Court. The County Justices, or County Commissioners, as they were often called, were appointed by the Governor. The County Commissioners still exist, but they have lost nearly all their judicial power, while retaining the numerous administrative duties with which the county courts were burdened at this early period. A distinction was made between justices of the quorum and the other justices, in the commission appointing them, some of the quorum justices being obliged to be present at a meeting of the court to make it a legal session. The sittings of these courts were regulated by acts of Assembly.<sup>1</sup> Each had a clerk,<sup>2</sup> and all were courts of record. The Attorney General was appointed by the Governor and sometimes acted as Receiver General.<sup>3</sup> From this time on the county courts were used more and more for administrative purposes, thus depriving the sheriff of much of his importance.

*Land.*—The land question was always important. Although granted to Lord Baltimore, the original rights to the land had belonged to the Indians. The Proprietor recognized this in at least a few instances.<sup>4</sup> Indeed, the settlers made many purchases from the Indians until forbidden by an act of Assembly, which declared that such purchases infringed upon the rights of the Proprietor.<sup>5</sup>

The Proprietor granted the land to the adventurers according to so-called Conditions of Plantation, several of which had been issued by this time. By these conditions

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<sup>1</sup> I. Assem. 149, 184, 232.

<sup>2</sup> I. Assem. 148, 149, 157, 162.

<sup>3</sup> I. Council, 261, 266.

<sup>4</sup> Kilty's Landholder's Assistant, 14.

<sup>5</sup> Kilty's Landholder's Assistant, 15; I. Assem. 248.



the fee remained to the Proprietor, while the use was granted in consideration of a small yearly quit-rent. The method of granting the land was simple. The settlers entitled to land by the Conditions of Plantation, or by special warrant of the Proprietor, first had these rights recorded at the office of the Secretary. Warrants of survey were then demanded for the quantity of land to which applicants were entitled, and were issued by the Governor, or the Secretary under his direction. These warrants, signed by the Governor, were directed to the Surveyor General, who, after making the survey himself or by his deputies, returned certificates of survey to the Secretary's office addressed to the "Lieutenant General." Grants or patents were then issued under the Great Seal, signed by the Governor, and endorsed by the Secretary and Surveyor General.<sup>1</sup> The quit-rent was one shilling sterling for each fifty acres granted, and could be paid in tobacco if the Proprietor was pleased to accept it in lieu of money.<sup>2</sup> The Proprietor had the right to establish whatever rents he chose. No land could be held contrary to the English statutes of mortmain,<sup>3</sup> and Maryland still follows this good old rule.

Besides the ordinary grants, many manorial grants were made, Lord Baltimore being freed by the charter from the action of the statute *Quia Emptores* (18 Edw. I.). These grants carried with them the rights to hold Court Baron and Court Leet, with view of the Frankpledge, and these rights were actually exercised.<sup>4</sup> The quit-rent for the manors was the same as for other grants, though at one time previous to this it had been twice as large. The lords of the manors had other rights, for example, to stray cattle<sup>5</sup> and escheats of tenants' land upon non-payment of rent. Occasionally land was forfeited by tenants for rebellion.<sup>6</sup> Perhaps fines for alienation of manorial lands fell, during this early period,

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<sup>1</sup> Kilty's Landholder's Assistant, 65, 66.

<sup>2</sup> I. Council, 223, 233.

<sup>3</sup> I. Council, 227, 236.

<sup>4</sup> Johnson's Old Maryland Manors.

<sup>5</sup> I. Assem. 271.

<sup>6</sup> Kilty's Landholder's Assistant, 28, 92, 103, 104.



to the lords of the manors, for little is heard of alienation fines due the Proprietor previous to 1658.<sup>1</sup> A large number of manors were surveyed for the Proprietor. These Proprietary manors were divided into leaseholds of terms of years at a small rent.<sup>2</sup>

A great quantity of land escheated to the Proprietor. The laws and rules of escheat were not those in use in England, but rested on the construction and pleasure of the Proprietor. The term escheat was applied in a most sweeping way and embraced nearly all methods by which land might revert to the Proprietor. Want of legal owners, forfeiture by treason or suicide, failure to pay the rent, seem to have been sufficient causes for escheat. The want of legal heirs was construed very broadly, so that the land of a man dying without heirs of the whole blood, in the direct descending line, was liable to escheat. The want of heirs was the most general cause of escheat. All these rules were very favorable to the Proprietor. The escheats were found by juries of the neighborhood upon a mandamus issued from the Court of Chancery to the sheriff of the county in which the land was situated, and ordering the sitting of such a jury upon the land in question.<sup>3</sup>

The inhabited portions of the province were divided into hundreds. The bounds of the hundreds were appointed by the Governor, and in the early period they were not only election districts, but also the bases of representation.<sup>4</sup> The militia was organized by these hundreds,<sup>5</sup> and they were the bases of the collection of revenue. As soon as the amount of the population justified it, counties were established by the Governor, each embracing several hundreds.

Each county had a sheriff and a county court. The assessments were levied upon the counties, and they were the bases of representation in the Assembly.<sup>6</sup> The county

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<sup>1</sup> McMahon's *Maryland*, 175.

<sup>2</sup> Kilty's *Landholder's Assistant*, 219, 220.

<sup>3</sup> Kilty's *Landholder's Assistant*, 173, 174, 175, 176.

<sup>4</sup> *I. Assem.* 260.      <sup>5</sup> *I. Assem.* 159, 193, 253.      <sup>6</sup> *I. Assem.* 284.

was also the basis of the poor relief.<sup>1</sup> At this time the counties were just beginning to come into prominence.

*Taxation.*—The expenses of the province were small. Almost all the officials were paid with fees. The expenses of the Assembly and the cost of wars with the Indians or internal dissensions were the main items of expenditure. In 1647 the Proprietor undertook to defray the whole charge of the government in consideration of an “act for customs” passed by the Assembly. This act granted the Proprietor a duty of ten shillings on each hogshead of tobacco exported from the province.<sup>2</sup> But in 1650 an act was passed relating to the levying of war within the province. By this act all the expenses of any such war were to be levied upon the inhabitants of the province.<sup>3</sup> The “whole charge of the government” meant, evidently, the payment of the officials of the Proprietor and the costs of any wars or disturbances, for we find the expenses of the Assembly and other minor expenses levied upon the inhabitants.<sup>4</sup>

The act of 1647 had caused much complaint<sup>5</sup> and had been the cause of an animated correspondence between the colonists and the Proprietor.<sup>6</sup> The Assembly of 1648 declared that the previous Assembly was not a legal one and protested against all the laws passed by it.<sup>7</sup> The Assembly of 1649 passed an act limiting the ten shillings export duty to tobacco shipped on Dutch ships to other than British ports, provided that one-half of the duty should be used in satisfying claims arising from the defense of the Proprietor’s rights in the recent rebellion (of Ingle).<sup>8</sup>

The Assembly of 1650 passed an act that no subsidies, aids, customs, taxes or impositions should thereafter be laid, assessed, levied or imposed upon the freemen of the province, or their goods or chattels, without the consent and approbation of the freemen obtained in a General Assembly.<sup>9</sup>

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<sup>1</sup> I. Assem. 296.

<sup>2</sup> I. Assem. 416.

<sup>3</sup> I. Assem. 302, 416.

<sup>4</sup> I. Assem. 231.

<sup>5</sup> I. Assem. 220, 221.

<sup>6</sup> I. Assem. 238, 262.

<sup>7</sup> I. Assem. 220.

<sup>8</sup> I. Assem. 252.

<sup>9</sup> I. Assem. 302.

In another act it was declared that the freemen could not be compelled to serve in any war without the province unless the General Assembly had approved such war, nor should martial law be exercised in any place except in camps and garrisons.<sup>1</sup>

The expenses of the Assembly and the other provincial expenses were levied by a direct poll tax. This was equally assessed upon the freemen of the county, hundred or province, according as the expense was for the benefit of county, hundred or province. The Puritans, by an act of 1654, taxed property, the law directing that not only freemen, but also all servants (except women not negro or Indian) should be taxed; also land, cattle and horses.<sup>2</sup> This act was of course not regarded after 1657. These taxes were levied by act of Assembly, which specified every appropriation.<sup>3</sup> The poor rate was assessed upon the counties.<sup>4</sup>

Common law fines and amerciaments and forfeitures formed another source of proprietary revenue. They were due the Proprietor as head of the State. Amerciaments were fines imposed by acts of Assembly and were granted by them wholly or in part to the Proprietor.<sup>5</sup>

Other sources of revenue for the Proprietor were the quit-rents and alienation fines. The quit-rents were the charges to be perpetually and annually paid to the Proprietor by those to whom he had granted land. The amount of the rent depended upon the Conditions of Plantation, and so it was never uniformly fixed. Rents at this period were payable either in money or commodities, as the Proprietor desired,<sup>6</sup> though at the beginning they were payable in wheat.<sup>7</sup>

Alienation fines had been little noticed, but in the year 1658 the new Conditions of Plantation declared that one year's rent should be reserved for fines for any alienations. These fines must be recorded in the provincial, or in a county

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<sup>1</sup> I. Assem. 302.

<sup>2</sup> I. Assem. 342.

<sup>3</sup> I. Assem. 142, 143, 144, 238, 284.

<sup>4</sup> I. Assem. 296.

<sup>5</sup> I. Assem. 108, 161, 193, 251, 286, 294, 295 are instances.

<sup>6</sup> I. Council, 223, 233.

<sup>7</sup> I. Council, 47.

court, and the fine paid before alienation, otherwise the alienation was invalid.

Besides all these revenues, the licenses for trade with Indians, for keeping ordinaries, etc., yielded something.<sup>1</sup> The Proprietary manors afforded revenue. Subsidies were occasionally granted to the Proprietor.<sup>2</sup> Moreover, debts due him were to be paid before any other debts.<sup>3</sup>

The fees due to officials of the province were regulated by acts of Assembly, which was never content to have them regulated by the Proprietor. Sometimes a Receiver General was appointed;<sup>4</sup> sometimes the Attorney General or the Secretary was also Receiver General.<sup>5</sup> By this time the offices of Secretary and Receiver General seem to have been considered as united in one person.<sup>6</sup>

*The Currency.*—There was but little money in colonial Maryland. Some coin had been acquired from the Spanish colonies and was of varying value. The actual currency in use was tobacco. Taxes were levied and collected in tobacco. Officials' fees were estimated and paid in tobacco, as were all debts, fines and contracts. This commodity was a legal tender by act of Assembly.<sup>7</sup> The Proprietor's rents were paid in tobacco. In fact, tobacco was money.

*The Militia.*—The Maryland militia was organized on the basis of divisions of the province called hundreds—a reversion to old Teutonic custom. All men in each hundred between sixteen and sixty years of age and able to bear arms met, chose a commander and arranged whatever they thought necessary for the common defense.<sup>8</sup> The Puritans enacted that each county should have a captain and other officers to see that the inhabitants were properly supplied with arms.<sup>9</sup> Afterwards the Proprietary government appointed colonels for each county. These colonels were usually members of the Council. The Governor was, by his

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<sup>1</sup> I. Assem. 307; I. Council, 300, 303.

<sup>2</sup> I. Assem. 123.

<sup>3</sup> I. Assem. 304.

<sup>4</sup> I. Council, 263.

<sup>5</sup> I. Council, 116, 261.

<sup>6</sup> I. Council, 323.

<sup>7</sup> I. Assem. 162.

<sup>8</sup> I. Assem. 253.

<sup>9</sup> I. Assem. 347.



commission, commander-in-chief, and led the troops in person. The "muster master-general," while the office lasted, had also a certain power over all the militia. The troop of the hundred was called a trained band, and had a sergeant to train it, whose fees were sometimes regulated by the Assembly. Systems of alarm upon signs of danger were carefully arranged and were rigorously enforced.<sup>1</sup>

*Religion.*—The facts of the Act of Toleration in 1649, its repeal in 1654, and re-establishment in 1658,<sup>2</sup> are well known. There was no original connection between the Church and the Government. No church could hold land contrary to the English statutes of mortmain.<sup>3</sup> By early statutes it had been declared that Holy Church should have all its rights and liberties within the province,<sup>4</sup> and by this term the Roman Catholic Church was most probably meant. By this time (1658) the Protestant part of the population outnumbered the Catholics.

*The Secretary.*—In point of importance the Secretary was the second officer in the province. He recorded all grants of land or offices, and was empowered to probate and record all wills and inventories and grant letters of administration. He was the secretary of the Council and recorded all the ordinances and proclamations of the Governor as well as any instructions.<sup>5</sup> The Secretary was the clerk of the Assembly until it divided into two houses.<sup>6</sup> After this division he remained the clerk of the Upper House.<sup>7</sup> He administered the oath of office to the Governor and the councillors. His income was drawn from fees, which the Assembly regulated by acts.<sup>8</sup> The Secretary at this time was the brother of the Proprietor and was given larger powers than any other previous Secretary,<sup>9</sup> but it is only necessary to state that these were intended as checks upon the

<sup>1</sup> I. Assem. 159, 193, 253, 347.

<sup>2</sup> I. Assem. 244, 340, 351; I. Council, 334.

<sup>3</sup> I. Council, 227, 235, 237.

<sup>4</sup> I. Assem. 83, 96.

<sup>6</sup> I. Council, 218, 328.

<sup>5</sup> I. Assem. 247.

<sup>7</sup> I. Assem. 286, 371.    <sup>8</sup> I. Assem. 289, 311.

<sup>9</sup> I. Council, 335.



power of the Governor. The Secretary sometimes collected the rents and other Proprietary dues,<sup>1</sup> and after 1658 is generally the Receiver General. Occasionally the Secretary was also the Attorney General.<sup>2</sup>

*The Surveyor General.*—This officer was first appointed in 1641.<sup>3</sup> He held office at the pleasure of the Proprietor,<sup>4</sup> and had the power to appoint deputies to assist him.<sup>5</sup> These deputies received such fees as he allowed, and he was held responsible for their conduct.<sup>6</sup> His pay was derived from fees, which, like those of the other officials, were regulated by act of Assembly.<sup>7</sup> All warrants of survey were directed to him by the Governor, and he executed them himself, or by his deputies, and then returned certificates of survey to the Secretary's office addressed to the Lieutenant General. He seldom executed these warrants himself, and in many respects resembles the steward of the old English manor. He was the counterpart of the seneschal of the Palatinate of Durham.

*The Muster Master-General.*—This officer was appointed in 1648. He was paid by fees<sup>8</sup> and held office at the Proprietor's pleasure. He seems to have been a kind of commander-in-chief, subordinate, of course, to the Governor, and saw to it that the military regulations of the government were carried out and the drills duly held. He perhaps exercised martial law when needed and carried out the penalties for disobedience.

*The Sheriff.*—The sheriff was appointed by the Governor. He was a county officer and served all writs and warrants.<sup>9</sup> He inflicted all required punishments upon criminals. He was the collector of all taxes laid by assessment upon the taxables. He kept criminals imprisoned and took bail from accused persons.<sup>10</sup> He held inquests in the absence of any

<sup>1</sup> I. Council, 116.<sup>2</sup> I. Council, 158.<sup>3</sup> I. Council, 101.<sup>4</sup> The first Surveyor General held *durante vita*.<sup>5</sup> I. Council, 219.<sup>6</sup> Kilty's Landholder's Assistant, 271.<sup>7</sup> I. Assem. 163, 312.<sup>8</sup> I. Council, 215; I. Assem. 283, 292.<sup>9</sup> I. Council, 117, 229.<sup>10</sup> I. Assem. 360.

coroner, and indeed was often appointed coroner as well as sheriff. To him the writs of election were issued. He held the elections and made the returns.<sup>1</sup> His pay was by fees, which were duly regulated by acts of Assembly.<sup>2</sup> The sheriff was the representative of the Proprietor's power in the counties and was responsible to the Proprietor alone. He was the possessor of large functions, and was in no way subordinated to the county courts. The only power the people had over him was the power to regulate his fees.

*The Constable.*—The constable was appointed by the Governor for each hundred. Every lord of a manor also appointed a constable.<sup>3</sup> His office was often connected with that of coroner,<sup>4</sup> and until the counties were organized, writs were directed to him to hold elections. The constable, during this earlier period, executed all writs and warrants. In a word, he exercised all the functions of a sheriff. At this time (1658) his duties are well summed up in the oath for constables enacted several years later.<sup>5</sup> He raised the hue and cry, arrested all law-breakers, and presented to the county courts all breaches of the laws of the province, and executed all warrants directed to him.

*The Coroner.*—This office was held either by the sheriff or the constable,<sup>6</sup> and did not become a distinct office until several years after 1658.

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<sup>1</sup> I. Assem. 260, 369.    <sup>2</sup> I. Assem. 289, 308, 360.    <sup>3</sup> I. Assem. 412.

<sup>4</sup> I. Council, 91.    <sup>5</sup> I. Assem. 410.    <sup>6</sup> I. Council, 85, 91, etc.

## CHAPTER III.

### THE MARYLAND PALATINATE.

Maryland was a Palatinate. Its charter gave Lord Baltimore, "all and singular, such and as ample rights, jurisdictions, privileges, prerogatives, royalties, liberties, immunities, and royal rights and temporal franchises whatsoever, as well by sea as by land, within the region, islands, islets and limits aforesaid, to be had, exercised, used, and enjoyed, as any Bishop of Durham within the bishopric or County Palatine of Durham in our kingdom of England ever heretofore hath held, used, or enjoyed, or of right could, or ought to have held, used or enjoyed."

The nature of the Palatinate of Durham has been fully discussed elsewhere.<sup>1</sup> The Proprietor had even more power than any Bishop of Durham ever had. Within the province of Maryland the Proprietor had regal power. It was his justice that was administered in the courts, and all writs and warrants were issued in his name. These courts were appointed by him, and he determined their jurisdiction and manner of proceeding. In them he had the laws executed, and passed sentences amounting even to confiscation and death. He likewise had the royal power of pardon and had admiralty jurisdiction. The Proprietor could erect towns, boroughs, cities, and ports of entry and departure.

From the Proprietor all land was held. He received all escheats and fines for alienations, and had sovereign title to all mines, wastes, forests and chases. He could erect manors with court leet and court baron. The Proprietor

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<sup>1</sup> A most excellent description of the constitution of the Palatinate of Durham may be found in J. S. Bassett's *Constitutional Beginnings of North Carolina*. In *Surtees' History of the County Palatine of Durham* and the *Publications of the Surtees Society*, more detailed information may be found.

could raise troops and levy defensive warfare, even pursuing enemies without the limits of the province. He could exercise martial law. He could impose duties upon ships and merchandise. He could establish churches and chapels and have them consecrated according to the ecclesiastical laws of England. He held their patronage and advowsons. Only through the Proprietor could the king do anything in the province. All these powers belonged to the Palatine of Durham, and all except the ecclesiastical<sup>1</sup> were exercised by the Proprietor of Maryland.

In the matter of legislation there is a difference. There was no provision in Durham for the assembling of the people to make laws. If the Palatine wanted any new laws they were passed by his Council, which was composed of the chief men of the county. The Proprietor, however, had the right to call assemblies of the freemen and enact laws with their assent. But the colonists insisted on their right to propose and enact laws with the assent of the Proprietor. This right was obtained. The Proprietor retained his right to initiate some legislation but not all. Maryland laws, like those of Durham, were published in the courts. The Proprietor was not obliged to submit these laws to the Crown for approval. In addition, the Proprietor could publish ordinances not extending to life, member or property. This has been aptly designated as a police power. Again, the Proprietor possessed an advantage over the Bishop of Durham, in that cases between the Bishop and his subjects could be appealed to the Court of Exchequer in London, whereas cases between the Proprietor and his subjects were finally settled in the Proprietor's courts, from which there was no appeal to the king. Parliament levied taxes on the Bishop of Durham, and these were collected by his officers, as taxes were collected in Maryland by the Proprietor's officers, but Parliament had no power to tax the Proprietor of Maryland, and the charter exempted him from royal taxation.

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<sup>1</sup> This power was exercised by the Proprietor after 1715.



The administrative machinery of the Proprietary government bears some likeness to that of the Durham Palatinate. The Governor of Maryland was its administrative head. He had the highest judicial jurisdiction and presided over the Court of Chancery. Thus he resembled the Chancellor of Temporalities of the Bishopric of Durham. In both governments are seen the Receiver General. In both the sheriff was the executive officer of the Palatine, collected the revenue and was responsible to the Palatine alone. The Seneschal of Durham bore some resemblance to the Surveyor General of Maryland, and the bailiff to the constable. The Bishop's Council had its counterpart in the Proprietor's Council, which, while it had less legislative, had more judicial power and also retained great influence in legislation.

The division of the courts into County Courts and Hal-mote Courts was followed in the powers given to the Provincial, Chancery, Admiralty and Council, and to the County Courts. While allegiance to the king was reserved, the oath of fidelity was taken to the Proprietor, and all writs ran "in the year of our dominion." In the period now to be considered it will be seen that the Proprietor had vastly more power in Maryland than the king had in England, and freely exercised his power. In no other American colony was there such despotic authority. In none was such absolute government ever established as existed in Maryland in this period.

The people had, by the charter, the rights of Englishmen and the right to consent to impositions. It was the constant assertion of these ancient rights that enabled the freemen of Maryland to resist successfully the demands of the Proprietor and to obtain a high degree of independence. But this was not accomplished without many struggles, some of which it is now intended to sketch for the purpose of throwing new light on Maryland constitutional history in a comparatively unknown period.

## CHAPTER IV.

### CONSTITUTIONAL HISTORY OF MARYLAND, 1658-1689.

It is intended to sketch the constitutional history of Maryland from 1658 to 1689. While the point of view of the people is taken, it is attempted to do justice to the Proprietor, who hitherto has received exclusive attention. The first division of the period may be entitled:

*The Restoration of the Proprietary Government and Fendall's Rebellion.*—In 1657 the Proprietary government was once more restored, but only in St. Mary's County. Not until the latter part of March, 1658, did the newly appointed Governor rule over the whole province, the six Puritans of Providence signing the articles March 26.<sup>1</sup>

Fendall, by his commission dated July 10, 1656, had been given greater powers than any Governor had exercised for a long time, but a check was soon placed upon Fendall by the appointment of Philip Calvert, youngest brother of the Proprietor, as Secretary.<sup>2</sup> The presence of a Calvert in the province was sure to keep prominent the privileges of the Proprietor, and also assured a lucrative position to a member of the family. The office given to Philip Calvert was that of Secretary and Receiver General, ranking next to the Governor. Almost the first thing the Council did was to ask the Assembly to free the Councillors from paying taxes for themselves and ten poll in addition, as was done in Virginia;<sup>3</sup> but it does not seem to have favorably impressed the Assembly, as no such law appears to have passed. The enactments of the Puritan Assemblies were torn from the records.<sup>4</sup>

The next thing to be noted is the persecution of the Quakers,<sup>5</sup> in direct violation of the law declaring all persons

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<sup>1</sup> I. Council, 340.

<sup>2</sup> I. Council, 327.

<sup>3</sup> I. Council, 341.

<sup>4</sup> McMahon's Maryland, 210.

<sup>5</sup> I. Assem. 351, 358.

who profess to believe in Jesus Christ, to have liberty of conscience and free exercise of their religion. The Quakers had made many converts, especially in the Puritan settlements.<sup>1</sup>

Baltimore and Charles counties were established at this time, thus increasing the number of counties to six.

Fendall's Rebellion was now in preparation. As early as October, 1658, Thomas Gerrard had been prosecuted by the Attorney General for having said, as it was alleged, that the Governor would yield to anything requested by the people of Anne Arundel, although it is doubtful whether Fendall had any idea of rebellion at that time. Gerrard was a friend of the Governor and does not seem to have suffered from this charge.

The real causes of the disturbance that now arose are scarcely explained by Maryland historians. Governor Fendall is charged with being the chief cause of rebellion. It is true that Fendall tried to keep in favor with the party of resistance, and that he was intimately connected with Gerrard, whose party was destined to triumph in 1689; but it was really the question of taxation that caused the so-called Fendall's Rebellion. It is sometimes said it was a Puritan movement, and so it was in one sense; but Gerrard, who seemed to be the real leader, was a Catholic who had been and was then a member of the Council. In 1647 an act was passed by the Assembly granting the Proprietor a duty of ten shillings on every hogshead of tobacco exported from the province. This act, by the admission of the Proprietor, was the cause of complaints.<sup>2</sup> In 1649 an act was passed, granting the Proprietor for seven years a duty of ten shillings on every hogshead of tobacco exported on any Dutch vessel, not bound to an English port. This act implies the repeal of the act of 1647, although not expressly declaring it so repealed.<sup>3</sup> The Puritans did not enter Maryland until 1649, and soon afterward overthrew the Proprie-

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<sup>1</sup> I. Council, 362.

<sup>2</sup> I. Assem. 420.

<sup>3</sup> I. Assem. 252.

tary government. They could not have been seriously affected by this act.

The Proprietor in 1659 sent instructions to Fendall to have the act of 1647 repealed upon condition that another be enacted, imposing a duty of two shillings on every hogshead of tobacco exported to Great Britain or Ireland, and ten shillings on every hogshead exported to any other country.<sup>1</sup> The act of 1647 also provided that the expenses of any war should be borne by the Proprietor, but an act of 1650 declared that the expenses of any war should be levied upon the taxables.<sup>2</sup> The determination of the Proprietor to have an export duty levied upon the province aroused an opposition that successfully resisted the demand until 1671.

Cromwell was now dead, and his son had resigned the Protectorship after a few months of power. It now seemed to the colonists that everything was at sea; whoever seized the government would keep it. This was the idea of Gerard and Fendall.

An Assembly was called, to which the demands of the Proprietor were submitted. The writs for the election of four burgesses from each county were issued,<sup>3</sup> and on February 28, 1660, the Assembly met. The membership of the Lower House is noteworthy. In the first place, Anne Arundel County, the center of Puritanism, sent seven delegates,<sup>4</sup> headed by Fuller, the head of the late Puritan government. This representation was a violation of the writs, which called for only four delegates from each county. Of the twenty-seven delegates chosen, at least twenty had been connected with the former Puritan government,<sup>5</sup> or their Puritanism can easily be proved.<sup>6</sup> Some also held office by Fendall's appointment.<sup>7</sup> Anne Arundel and Calvert counties had eleven delegates. Baltimore County was repre-

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<sup>1</sup> I. Assem. 420.

<sup>2</sup> I. Assem. 302.

<sup>3</sup> I. Assem. 381.

<sup>4</sup> I. Assem. 382.

<sup>5</sup> Compare I. Assem. 382 with I. Assem. 339, 340, 359, I. Council, 317, 318.

<sup>6</sup> I. Council, 351, 352, 358.

<sup>7</sup> I. Council, 348.



sented for the first time, and its delegates, after some hesitation, joined Fendall's party.

On the side of the Proprietor there were assured only three delegates of St. Mary's County, and of these we can only be entirely certain of one named Barton, who had been especially commended to Fendall by the Proprietor for preferment.<sup>1</sup> The Lower House promptly contested the election of these three delegates<sup>2</sup>—the first instance of a contested election in Maryland. Fendall ordered a new election, but the only man defeated was Barton, who was replaced by Gardner, certainly an adherent of the Calvert party. The Governor had power to influence the elections through his appointees, the sheriffs. This Assembly illustrates the fact. In the Upper House, Fendall had Gerrard and Utye. Lloyd, who was sick at this time, was absent. For the Proprietor there were Philip Calvert the Secretary, John Price the commander of the militia, Clarke the Surveyor General, ex-Governor Stone (who died about this time), Baker Brooke, who was devoted to Lord Baltimore, and Luke Barber, an ardent Catholic.

The Lower House demanded that the instructions of the Proprietor for the repeal of the act of 1647 be sent down.<sup>3</sup> The commission for the repeal of this act, together with a "bill for customs to be propounded to the Assembly," was read in the Upper House and sent down to the Lower House. Nothing more is heard of this commission, nor, indeed, was such an act ever passed. The act of 1647 was repealed the following year.<sup>4</sup> The duty, when it did pass in 1671, was made a uniform one of two shillings per hogshead of tobacco. Part of the duty even then was applied to the expenses of the province.<sup>5</sup>

The Lower House sent the following declaration to the Upper House, that "this Assembly of Burgesses judging themselves to be a lawful Assembly without dependence on

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<sup>1</sup> I. Council, 326.

<sup>2</sup> I. Assem. 383.

<sup>3</sup> I. Assem. 383.

<sup>4</sup> I. Assem. 416.

<sup>5</sup> II. Assem. 284.

any other Power in the Province now in being is the highest Court of Judicature. And if any Objection can be made to the Contrary, Wee desire to heare it.”<sup>1</sup> This declaration will not seem so strange if compared with that made by the Virginia Assembly at this time, that “the supream power of the Government of this country shall be resident in the Assembly” and that “all writs issue in the name of the Grand Assembly of Virginia.”<sup>2</sup>

The Upper House asked: (1) If this paper was addressed to the Governor and Council, or to the Governor and those of the Council present by virtue of special writs received for the Assembly; (2) if they judged themselves a complete Assembly without the Governor and the members of the Upper House; and (3) if they judged that they were wholly independent of the Lord Proprietor. The Lower House then requested a conference, which was held the next day. In this conference Fendall, Gerrard and Utye declared in favor of the Lower House, while Philip Calvert, Baker Brooke and Price opposed it. The Lower House informed the Upper that they could not allow it to be an Upper House, but that they might come and sit in the Lower House, to which Philip Calvert replied that in that case the Governor was President of the Assembly and the Speaker must yield his place to him.

Another conference was held, in which it was agreed that the Governor should preside and have a casting vote, but the Speaker was retained, with the power of adjourning or dissolving the Assembly. Philip Calvert refused to agree to these terms, “it being a manifest breach of his lops Right Royall Jurisdiction and Seigniorie,” and wished to have his reasons entered on the journal of the Lower House, but this was refused by the Governor; “Whereupon hee and Mr. Baker Brooke departed the House (after leave asked) and given in these words or to this effect (vizt) you may if

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<sup>1</sup> I. Assem. 388.

<sup>2</sup> Campbell's *Virginia*, 242; Cooke's *Virginia*, 219.

you please, wee shall not force you to goe or stay, uttered by the Governor."

The Upper House had now been virtually dissolved and the Lower House ruled supreme. Fendall received a commission from the burgesses, as they called themselves, and Gerrard, Utye, and Slye, the Speaker of the House and the son-in-law of Gerrard, were appointed to the Council.<sup>1</sup>

Fendall and the Puritans were now in control, but their reign was short. The following May, Charles II. returned to England as king. This event meant, among other things, Baltimore's restoration. Philip Calvert was commissioned Governor, and the King ordered Virginia to aid Lord Baltimore in regaining Maryland. As soon as all these things became known in Maryland, men saw that resistance was useless and none was attempted. The uncertainty of the English Government had been the immediate cause of the rebellion; the firm determination of that Government caused its immediate collapse.<sup>2</sup> By the last of October the news had arrived and the new Governor began to take rigorous measures against the rebellion. A new Council was appointed and an armed force collected.<sup>3</sup> Fendall, seeing resistance was useless, surrendered and was speedily tried. Thus ended his rebellion.

*The Period of Resistance, 1660-1670.*—This decade was marked by the resistance of the Assemblies to the demands of the Proprietor, and was ended in 1670 by the disenfranchisement of the poorer classes of the province.

Lord Baltimore wrote to the Governor on no account to spare Fendall's life, "nor if yow can doe it (without hazarding the regaineing of the Province) to pardon so much as for life any of those that sate in the Council of warr at Ann Arundel and consurred to the Sentence of death gainst Mr Eltonhead, or other of my friends then and there murthered, and haue now againe engaged against me in this Second

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<sup>1</sup> Kilty's Landholder's Assistant, 20.

<sup>2</sup> I. Assem. 389.

<sup>3</sup> I. Council, 394.

Rebellion, but to doe Justice upon them and I shall iustify you in it." The estates of Gerrard and Hatch, who was Fendall's father-in-law,<sup>1</sup> were to be confiscated. The Governor might use martial law if he so desired.

Lord Baltimore's reference to the Anne Arundel court-martial shows the Puritan basis of this rebellion, and reveals the long-continued resentment of the Proprietor. As a matter of fact, William Fuller suffered more severely than any other. He had to flee from the province and lost his estate. An attempt was made by certain informers to involve his wife and friends in a plot for his return in 1664.<sup>2</sup> Fendall, Gerrard and Hatch were sentenced to banishment and their estates were confiscated; but these sentences were remitted, and only inability to hold or elect to office was imposed, with security for good conduct. Upon Hatch was laid a heavy fine and banishment.<sup>3</sup>

Why was any leniency shown? Partly, we may conjecture, because of the reluctance of the Council to go too far and thus irritate the Puritans, and partly because neither Fendall nor Gerrard was a Puritan; Gerrard was indeed a Catholic. The temper of the people was still ugly toward the Proprietary government, for an insurrection was raised in Charles County the very month of the trial, by one John Jenkins, who had been a member of Fendall's Assembly.<sup>4</sup> Several men concerned in this affair were tried by jury and acquitted, a fact complained of by the Governor to the Assembly as contrary to law. He asked that a law be passed to provide for such cases.<sup>5</sup> The Lower House, however, voted that the persons indicted for "mutiny and sedition" be cleared.

In 1657, in his instructions to Fendall, Baltimore had authorized him, with the consent of the Secretary and two others of the Council, to make any foreigner capable of the

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<sup>1</sup> Council Book, 1677-1683, 337.

<sup>2</sup> I. Assem. 494.

<sup>3</sup> This banishment was remitted by Charles Calvert, I. Council, 442.

<sup>4</sup> I. Council, 382, 445.

<sup>5</sup> I. Assem. 402.



Conditions of Plantation, but no action seems to have been taken on this until 1661, when letters of denization were issued to Augustine Herman, and soon afterwards to many others. The "Conditions" were sometimes evaded, for we find a certain foreigner named as county commissioner before letters of denization were issued to him.<sup>1</sup>

An Assembly was now called by the Governor in 1660. The Lower House immediately complained about the writs of election sent to the sheriffs and asked an explanation. These writs directed the sheriffs to "cause to be elected such and so many discreete men as you shall thinke fitt to serve as Burgesses in the said Assembly." The Governor and Council replied that the sheriff could reject only those disqualified by crime, and the choice of the number of burgesses was given to him only as representing the county; the freemen could really choose as many as they desired. This explanation seemed to be satisfactory, but it can easily be seen how great an influence the sheriffs, the appointees of the Governor, could exert in the elections. The Lower House, evidently mindful of the last Assembly, now asked that an act be passed granting freedom of speech to its members, to which request the Governor responded that there was no necessity for such an act and that they would have as much freedom of speech as any burgess in Parliament.

The Assembly thereupon passed several important acts—first of all, an act establishing a mint. This measure had been urged by Lord Baltimore in 1659. He had coined some money at that time,<sup>2</sup> and an "Act for setting up of a Mint" had been considered in the previous Assembly.<sup>3</sup> After some opposition the act was now passed. The opposition was due to the doubts of some members whether the Palatine of Durham had the power to coin money.<sup>4</sup> This is another example of the royal power exercised by Lord Baltimore. The act further provided that counterfeiting and

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<sup>1</sup> I. Council, 424, 429.

<sup>2</sup> I. Council, 365, 383, 385.    <sup>3</sup> I. Assem. 387.    <sup>4</sup> I. Assem. 400.

all like offenses should be punishable by death; and that the Proprietor should accept this coined money for all debts due him from the colonists.<sup>1</sup>

A Pension Act was also passed.<sup>2</sup> By an act for the appointment of certain officers, the Assembly took new power into its hands. Three persons were to be yearly recommended by each county court to the Governor as suitable persons to be appointed sheriffs. The Governor was to name one of the three, sheriff, and this appointee was to serve one year.<sup>3</sup> The same restriction of the terms of the sheriffs in England had been made by Parliament as early as 1444.<sup>4</sup> Each county court was likewise to name the constables of the hundreds, who should hold no other office. The lords of the manors named their own constables.<sup>5</sup>

This noteworthy attempt to curb the appointing power shows the importance of the sheriff. The act, however, was only observed for a few years by the Governor and then disregarded, as "infringing the prerogative" of the Proprietor. Of course the county courts were appointed by the Governor, but it was likely that the court would have named good men. The limitation of the sheriff's term to one year made him responsible to the people.

As regards the customs duties, which had caused such a stir in the preceding Assembly, they were repealed and a tax of twelve pounds of tobacco was levied on each taxable person in the province, to be paid to the Proprietor for the support of the government.<sup>6</sup> The Assembly declared that when the duty of ten shillings per hogshead was granted in 1647, the Proprietor assumed all the charges of the government both in war and peace, but that, by an act of 1650, the charge for any war within the province was to be borne by equal assessment on the inhabitants; therefore they now repealed the act of 1647.<sup>7</sup> For recompense the Assembly

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<sup>1</sup> I. Assem. 414.

<sup>2</sup> I. Assem. 408.

<sup>3</sup> I. Assem. 412.

<sup>4</sup> Taswell-Langmead's *English Constitutional History*, 331.

<sup>5</sup> I. Assem. 410.

<sup>6</sup> I. Assem. 417.

<sup>7</sup> I. Assem. 416.

passed a port and anchorage duty of one-half pound of powder and three pounds of shot, or their value, for every ton of burden in the case of all vessels having a deck flush fore and aft, and trading to the province but not owned in it.<sup>1</sup> To this act the Proprietor had already given his assent in a long letter, in which he abused Fendall while actually justifying him.<sup>2</sup> Thus the rebellion of the preceding year was successful in one of its main objects. The taxes were not raised. The Upper House refused to assent to an act for the maintenance of clergymen, a refusal which was repeated many times before 1689.<sup>3</sup> The Upper House also declared that the transcription of the old laws was a perquisite of the Secretary and could not be taken away from him. Talbot County was at this time set off by the Governor.

During all this time Philip Calvert was Governor, Chancellor, Secretary, and Treasurer. In fact, he centered all the chief offices in himself. But now there was a change. Toward the end of 1661, Charles Calvert, the son of Lord Baltimore, arrived with the commission of Governor.<sup>4</sup> Philip Calvert was to remain Chancellor and Keeper of the Great Seal. To Henry Sewall, who came with Charles Calvert and was his intimate friend, was given the office of Secretary.<sup>5</sup> This was the beginning of the system of appointing members or close friends of the Calvert family to all the important offices. From this time on the government of the province became more and more a family affair. Just at this time, however, there was one member of the Calvert family who was not at all pleased; Philip Calvert had been shorn of most of his power and, what was more grievous, of most of his fees. That there was no love lost between uncle and nephew may be seen from a letter written by Charles Calvert to his father.<sup>6</sup> In the same letter is seen the Chancellor's dislike for the Secretary and his opposition to him.<sup>7</sup> Charles Cal-

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<sup>1</sup> I. Assem. 418.<sup>2</sup> I. Assem. 420.<sup>3</sup> I. Assem. 406.<sup>4</sup> I. Council, 439.<sup>5</sup> I. Council, 439.<sup>6</sup> Calvert Papers, 241, 242, 246, 251.<sup>7</sup> I. Assem. 524.

vert was a firm friend of Sewall's and frequently granted him extra powers.<sup>1</sup>

A curious passage may be quoted, showing the light in which the Calverts viewed Maryland. "Your lopps bearing date as p Margent I receiu'd & the several Bills of lading & inuoyce & other papers being duplicats of those I had receiu'd by Tully, & att the same time my Cozen Wms. sister arriued here & is now att my house, & has the care of my household affaires, as yett noe good Match does prsent, but I hope in a short time she may find one to her owne content & yor. Lopps desire I shall further what I can towards it."<sup>2</sup> A match was soon found for her, for she was married to Baker Brooke the following year. The natural consequence of this alliance was that Brooke was immediately created a member of the Council. A few years later he was appointed Surveyor General. For convenience, Charles Calvert granted to Sewall the right to sign warrants for land.<sup>3</sup> With Philip Calvert sided Henry Coursey, who seemed one of his most intimate friends.

An Assembly was called by the Governor. The writ required "one, two, three or foure discreete Burgesses," instead of the obnoxious "such and soe many discreete men as you shall think fitt to serve as Burgesses." This continued to be the form for a long time.<sup>4</sup> The first thing considered was a declaration of several inhabitants of Anne Arundel County, which the Upper House declared seditious. They desired the Lower House to find out the authors of it. The Lower House desired that if any member abuse his freedom of speech he be tried by the Assembly and not by any court, to which point the Upper House agreed. The Lower House then acknowledged that one of its members was connected with the seditious paper and wished to try him, but at a conference the "Upper House did satisfye the lower that Robert Burle is not to be tryed by an Assembly,

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<sup>1</sup> I. Council, 444.

<sup>2</sup> Calvert Papers, 244.

<sup>3</sup> I. Council, 444.

<sup>4</sup> I. Assem. 425.



but at a Provincial Court regularly.”<sup>1</sup> Burle, however, saved himself by humble submission.

About this time some ten men, including Fendall, were arrested as dangerous characters. The mutinous spirit was evidently still alive.<sup>2</sup> The Upper House refused to pass an “Act prescribing how to give Evidence to those of tender Consciences,”<sup>3</sup> an act evidently intended for the benefit of Quakers, who suffered from an act passed in the previous Assembly.<sup>4</sup> The Assembly declared, in regard to sheriffs, that the three persons nominated by the county court must give bond to the same and that the county would be answerable to the Proprietor. Sheriffs must execute all warrants, writs and proclamations directed to them by the Governor and Secretary, and relating only to the public, without fees. A statute of limitations was passed which has lasted, practically in the same shape, until to-day.<sup>5</sup>

An act defining taxable persons was passed and a fee was imposed on marriages.<sup>6</sup> In an act concerning the Secretary’s fees, the Secretary was directed to send a copy of the laws to each county court, at a charge of 1000 pounds of tobacco.<sup>7</sup> The Governor’s salary was fixed at 25 pounds of tobacco per poll.<sup>8</sup> In the beginning of 1663 a commission was issued to Elzey, Horsey, Thorne and Odbur to grant land warrants on the Eastern Shore in any part below the Choptank river.<sup>9</sup> This was the beginning of the Eastern Shore Land Office.<sup>10</sup> All fees from such warrants were to go to the Secretary.

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<sup>1</sup> I. Assem. 430.

<sup>2</sup> I. Council, 445, 449.

<sup>3</sup> I. Assem. 436.

<sup>4</sup> I. Assem. 411.

St. Mary’s County complained of having the Provincial Court Grand Jury, to which it was answered that every county ought and must have a Quarterly Grand Jury. I. Assem. 438.

<sup>5</sup> I. Assem. 449.

<sup>6</sup> I. Assem. 449, 450.

The purchase of a State House and prison was authorized (the prison was ordered to be built by the Governor and Council). I. Council, 460.

<sup>7</sup> I. Assem. 454.

<sup>8</sup> I. Assem. 452.

<sup>9</sup> I. Assem. 462.

<sup>10</sup> In 1661 such a power had been given for six months only to Scarburgh, Revel and Elzey. I. Council, 435.

The next Assembly was called in the September of this year. Jerome White, the Surveyor General, had been made councillor by the Proprietor. It is worth noting that Thomas Notley now first appears. The first naturalization act was passed.<sup>1</sup> The Assembly ordered that a pillory, stocks and a ducking stool be set up in each county, and irons for the burning of malefactors. The sheriffs were to take bail from all persons arrested. The Governor's pay was continued at twenty-five pounds of tobacco per poll, and the Secretary was created a notary public.<sup>2</sup>

Three important acts were passed concerning land. First, that all conveyances of land or houses must be in writing; "noe Mannors Lands Tenemts or other hereditamts shall pass alter or change from one to another within this Pvince whereby an Estate of Inheritance or Freehold shall be made or take Effect in any Pson or Psons," unless made in writing, indented, sealed, and enrolled in the Provincial Court or the county court. The clerk of the court was to enroll these deeds and, at the end of the year, send the roll to the Secretary.<sup>3</sup> Second, any person holding quiet possession of land for five years should be considered as holding sufficient title.<sup>4</sup> Third, servants should no longer receive any land at the expiration of their term of service.<sup>5</sup>

In September, 1664, a new Assembly met. It passed acts providing for ferries and a magazine, but is chiefly interesting as showing the animosity of Philip Calvert and Henry Coursey to Henry Sewall, the Secretary,<sup>6</sup> and for the passage of an "Act concerning Negroes & other Slaves." By this act all negroes and slaves were to serve during their life-time. Any freeman marrying a slave should be a slave to the same master during the slave's life-time. Any issue of such women should be slaves, except the issue of women already married, who should serve until thirty years of age.<sup>7</sup>

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<sup>1</sup> I. Assem. 462.    <sup>2</sup> I. Assem. 490, 491, 492, 498.    <sup>3</sup> I. Assem. 488.

<sup>4</sup> I. Assem. 501.

<sup>5</sup> I. Assem. 496.

<sup>6</sup> I. Assem. 524.

<sup>7</sup> I. Assem. 527, 533.

In 1666 the Governor received a new commission, and, with the Chancellor, was sworn in, as was also Richard Boughton, the new Secretary. Somerset County was soon after established.<sup>1</sup>

The Assembly that met this year held an interesting session. The Speaker chosen was Thomas Notley,<sup>2</sup> a man of whom we shall hear further. There is an account of a Baltimore County election in the proceedings of this session, showing the power of the sheriff in elections. It seems this sheriff was also clerk of the court, and, while at one of the court sessions, received a writ for the election of delegates to the Assembly. He immediately held an election, although, of course, only a few of the inhabitants were present.<sup>3</sup>

The Lower did not always agree with the Upper House. The chief cause of dispute was over the "Cessation of Tobacco," as it was called. It was an agreement not to plant any tobacco for a year. This cessation was greatly desired by the Governor and the Council, whose fees, paid in tobacco, were diminishing in value. The Lower House opposed the measure.<sup>4</sup> The contest was quite lively, the Lower House refusing to go into conference with the Upper or to debate the matter, saying it would infringe upon their rights. An appeal to English customs was then made by the Upper House. It was urged that the House of Lords used to sit and vote with the Commons, and that the Proprietor had absolute right to do as he pleased in the province. But for his command to the contrary, they would come and vote with the Lower House.<sup>5</sup>

The Lower House did not go into conference with the Upper, but nevertheless consented to the proposed cessation if Virginia and the Carolinas should do likewise. The objections of the Lower House had been most skillfully answered

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<sup>1</sup> I. Council, 553.

<sup>2</sup> II. Assem. 10.

<sup>3</sup> II. Assem. 74.

<sup>4</sup> II. Assem. 36, 37, 38, 39, 40, 41, 43, 44, 45, 49, 66, 97, 98, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 113.

<sup>5</sup> II. Assem. 42.

by the Upper.<sup>1</sup> The Speaker and other members of the Assembly wrote to the Proprietor asking him to veto the act, which he did.<sup>2</sup> The conflicting interests are well shown in Lord Baltimore's answer to the remonstrance of Virginia to the king on account of this veto.<sup>3</sup> The Lower House was inclined to assert itself and its rights.<sup>4</sup> It called itself a House of Commons.<sup>5</sup> This fact was perhaps due to a preponderance of the old Puritanical influence, for quite a number of the members had been members of Fendall's Assembly and were in sympathy with it.<sup>6</sup>

The Chancellor was a figure of importance. He informed the Assembly of the reasons for calling the session and was quite prominent at various times.<sup>7</sup> The Lower House was very careful of its records, and an act was passed to make sure of their preservation.<sup>8</sup> As usual, the limitation of fees was an important matter, and something was done toward it<sup>9</sup> in the case of the Muster Master-General as well as for the clerks of the county courts. The Governor was empowered to carry on war without the province for two years.<sup>10</sup> This Assembly, like others, had the danger of an Indian war to consider.

The beginning of Maryland road laws is seen in an act providing for highways and making the heads of rivers, creeks, branches and swamps passable for horse and foot. The roads were to be selected by the county commissioners, who were to appoint overseers and levy tobacco or labor upon the taxables of the county. The law has remained in force until to-day with scarcely any change.<sup>11</sup>

<sup>1</sup> II. Assem. 45, 109.

<sup>2</sup> II. Council, 18.

<sup>3</sup> II. Council, 15.

<sup>4</sup> II. Assem. 24, 89, 91.

<sup>5</sup> II. Assem. 64.

<sup>6</sup> Slye, Preston, Burle, Besson, Utye, Howell, Wade, Gerrard, Fowke and others.

<sup>7</sup> II. Assem. 10, 49, 109.

<sup>8</sup> II. Assem. 76, 133.

<sup>9</sup> II. Assem. 135, 137.

<sup>10</sup> II. Assem. 136.

<sup>11</sup> II. Assem. 134. In the discussion of the bill it was decided that roads should be fifteen feet wide, but this seems to have been abandoned with other things later on. II. Assem. 68, 77.



Among other important acts passed this session were those forbidding that any person should be sheriff and clerk at the same time,<sup>1</sup> or that a county justice, sheriff or county clerk should plead any case as attorney in his own court,<sup>2</sup> both of which abuses were serious. A coroner was to be appointed in each county,<sup>3</sup> and a copy of the laws of the province was to be sent to each court, for which copy the Chancellor got a handsome fee.<sup>4</sup> A bill was introduced for settling clergymen in every county. It failed to pass, but caused some disturbance.<sup>5</sup> The introducer of the measure was called a "ffactionous fellow" by the clerk of the House, who was a Roman Catholic.<sup>6</sup>

Of the next few years we know but little. The chief measure was the erection, by ordinance of the Governor, of certain ports or towns where all loading or unloading of ships must take place. The ordinance was re-enacted almost yearly, and was evidently not obeyed, despite the inducements offered.<sup>7</sup> Dorsett, later called Dorchester County, was set off during this period. The Assembly that met in 1669 was resolved to remedy affairs. The Governor communicated to the Assembly the Proprietor's veto of nine laws passed in 1664.<sup>8</sup> The Lower House immediately asked for a copy of Lord Baltimore's charter, which was given, and then demanded to know if there was any person in the province who could confirm bills passed by this

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<sup>1</sup> II. Assem. 132.

<sup>2</sup> II. Assem. 132.

<sup>3</sup> II. Assem. 130.

<sup>4</sup> II. Assem. 133.

An appropriation was made for building a prison, and innkeepers were regulated. II. Assem. 139, 148.

All persons in the future who wished to leave the province were required to post their names three months before in the Secretary's office, and if no objection at the end of this time, the Governor issued passes to them. I. Assem. 145.

This law gave rise to an interesting dispute later.

<sup>5</sup> II. Assem. 86.

<sup>6</sup> Davis' Day Star, 137, 225.

That this Assembly enjoyed life is shown by their expenses, which included wine, brandy, beer, rum, "Limeade," and "Beverage with sugar in it."

<sup>7</sup> II. Council, 31, 35, 47.

<sup>8</sup> II. Assem. 157.

Assembly so that they could not be repealed except by consent of the Assembly. The Upper House answered that this power belonged to the Proprietor alone.<sup>1</sup> This power of the Proprietor to repeal laws whenever he wished was always considered a great grievance by the colonists. The Upper House was now composed of Charles Calvert, Philip Calvert, William Calvert, Baker Brooke, who had married William Calvert's sister, Jerome White, the Surveyor General, William Evans, commander of all the military of the province, Henry Coursey, the close friend of Philip Calvert, and Thomas Trueman. The Calvert family had the majority, and from this time on continued to have it.

The Upper House took up the case of a clergyman, Charles Nicholett, who had preached a sermon to the members of the Lower House. He had urged them to keep before them the example of the last House of Commons in England. He said they had the same power and liberty as the people of England, and if they did not pass laws agreeable to their conscience they possessed no real liberty. The people expected much, and the Assembly should consider especially the heavy taxes of the preceding year. All this was considered "seditious" by the Upper House. When summoned before it, Nicholett said he had been urged by members of the Lower House to stir it up to do its duty, but upon being asked their names he denied that he had said any such thing. He was then fined and ordered to acknowledge in the Lower House his error in meddling in governmental affairs, and had to ask the pardon of the Proprietor, Governor and Assembly.<sup>2</sup>

Another cause of complaint was the taxes. The Lower House asked by what law the last levy was raised. The Upper House said it was by the perpetual law called an "Act concerning the levying of war within the Province."<sup>3</sup> The Lower House now prepared a statement of the public

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<sup>1</sup> II. Assem. 159, 161.

<sup>2</sup> II. Assem. 159, 162, 163.

<sup>3</sup> II. Assem. 161.

grievances, seven in number: (1) That there was no one authorized by the Proprietor to confirm the laws. (2) That laws in the law-book signed "his Lordship willeth these to be laws," should be repealed only with consent of the Assembly, and yet they were annulled without the consent of the Assembly. (3) That the raising of the last levy was contrary to the Proprietor's charter and the laws of the province, and without the consent of the freemen. (4) That privileged attorneys were a grievance. (5) That the sheriffs seized tobacco upon pretence of public debt. (6) That officers took illegal and excessive fees. (7) That vexatious informers were a grievance.<sup>1</sup>

As far as the first two charges are concerned they were doubtless grievances, but perfectly justified by the charter. Nevertheless it was hard to have a law annulled after years of enforcement; everything done under the law was thus made illegal. The other charges are without doubt justified. As early as 1650 the Assembly had declared that without its consent no money should be raised.<sup>2</sup> This was an attempt to raise money as the Council pleased, or, in a word, to govern without a representative Assembly, as had been tried in England years before. The Upper House made an elaborate answer to the grievances, declaring that they were all prerogatives of the Proprietor and demanding that the Lower House raze the paper from its journal.<sup>3</sup> Then came quite a contest, during which the Upper House informed the Lower that they were not like the English Commons, but their powers were only such as the Common Council of London, and that their only power to meet was by virtue of Lord Baltimore's charter. No charter, no Assembly; no Assembly, no privileges.<sup>4</sup>

This doctrine made the Assembly of small moment and the prerogatives of the charter everything. By logical deduction the Governor and Council had all power. The

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<sup>1</sup> II. Assem. 168.

<sup>2</sup> I. Assem. 302.

<sup>3</sup> II. Assem. 173, 177.

<sup>4</sup> II. Assem. 178.

Council was nothing but a family ring. The result was to give all offices to the Calverts or their relatives, who got what they could and did what they pleased. In a word, the field of Maryland was to be worked by them for the sake of offices and fees. The colony was to be governed absolutely by means of the Proprietor's prerogative. The Lower House finally agreed to raze the first three charges. The Upper House agreed to join in asking the Proprietor to remedy the other grievances.<sup>1</sup> One of the privileged attorneys was impeached, but to no purpose,<sup>2</sup> for he was evidently a favorite of the Governor.<sup>3</sup> The Upper House acted with great arrogance toward the Lower and asked it why it did not pass certain laws.<sup>4</sup> Among other things the Lower House was told that the appointment of sheriffs belonged to the royal power of the Proprietor, and no act should be passed concerning it.<sup>5</sup> The slight check that the Assembly had striven to place on sheriffs was thus done away with. The act had not been observed by the Governor for several years.<sup>6</sup> The fees of officers had been complained of and the sheriff's fees were regulated. The Chancellor showed his desire for fees,<sup>7</sup> and, although a source of complaint,<sup>8</sup> his fees were not regulated. The Governor's pay, however, was changed from a poll tax of 25 pounds of tobacco to six pence per hogshead of exported tobacco.<sup>9</sup> Among the most important laws passed was one making tobacco a legal tender at the rate of three halfpence per pound for payment

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<sup>1</sup> II. Assem. 179, 180, 181, 182, 183.

<sup>2</sup> II. Assem. 163, 167, 168, 169, 172.

<sup>3</sup> I. Calvert Papers, 264.

<sup>4</sup> II. Assem. 190, 193, 194.

<sup>5</sup> II. Assem. 197.

<sup>6</sup> The sheriff's arbitrary exercise of power is shown in the election in Somerset County to this Assembly. II. Assem. 187.

<sup>7</sup> II. Assem. 186, 189.      <sup>8</sup> II. Assem. 176.      <sup>9</sup> II. Assem. 217.

The Lower House rejected one bill for the Governor's support and refused to confer with the Upper House as to the reason of their dissent, as it would be a breach of their privileges. II. Assem. 189, 190.



of money debts, with no refusal allowed.<sup>1</sup> The Proprietor having repealed the act appointing a public notary, the Governor, by ordinance, created the chief clerk of the Secretary a public notary.<sup>2</sup>

Charles Calvert now paid a short visit to England. He named Philip and William Calvert as Deputy Governors. His jealous fears of Philip Calvert had been calmed by the Proprietor's declaration that Charles Calvert, but not his deputies, could suspend members of the Council or add new members.<sup>3</sup> At the same time the quit-rents were raised to two shillings for every fifty acres.<sup>4</sup> During Charles Calvert's absence in England he raised the number of Deputy Governors to four. Philip and William Calvert, Baker Brooke and Jerome White formed a government by a kind of family council.<sup>5</sup> Office-holding in Maryland henceforth became more and more a family affair.

William Talbot, the nephew of Lord Baltimore, was appointed Secretary and Probate Judge of the province and also Public Notary for Maryland.<sup>6</sup> He was instructed to look carefully after escheated and forfeited lands, Proprietary manors and quit-rents, alienation and other fines.<sup>7</sup> The law and rules for escheats did not follow English practice, but were whatever the Proprietor pleased.<sup>8</sup>

Inducements were offered to settlers in the disputed lands on the Eastern Shore.<sup>9</sup> Again we find the separation of the Land Office in the appointment of William Stevens and James Weedon to grant, under restrictions, land warrants for the Eastern Shore.<sup>10</sup> A customs collector for the Eastern Shore was also appointed.<sup>11</sup> This year the sheriff's return of

<sup>1</sup> II. Assem. 220.

Like the preceding Assembly, this one took care of its records by act, Assem. 209.

<sup>2</sup> II. Council, 49.

<sup>3</sup> II. Council, 55.

<sup>4</sup> II. Council, 54.

<sup>5</sup> II. Council, 66.

<sup>6</sup> II. Council, 70.

<sup>7</sup> II. Council, 72.

<sup>8</sup> Kilty's Landholder's Assistant, 176.

<sup>9</sup> II. Council, 63, 78.

<sup>10</sup> II. Council, 79, 124.

<sup>11</sup> II. Council, 83, 104.

tithables was not accepted, and it was ordered that the constables make lists of the tithables of their hundreds and deliver them to the Council.<sup>1</sup> For the first time the Governor appointed a Deputy Surveyor.<sup>2</sup> The most important constitutional change of the year was the restriction of suffrage.

*The Period of Submission, 1670-1676.*—During these years the Proprietor gained almost all he demanded from the province, especially in regard to the export duty of two shillings per hogshead. The Assemblies offered some resistance, although in the main they were very submissive. The last one before this period had been very unruly. In Virginia suffrage had just been restricted on account of alleged unruly proceedings and disturbances at elections.<sup>3</sup> Virginia influence was always marked in the action of Maryland. Restriction of suffrage may have been decided upon in the conference of Lord Baltimore with Charles Calvert in England about this time. In later years the example of England was cited as well as that of Virginia.<sup>4</sup> Charles Calvert can always be found in opposition to the poorer classes, and deserves not the respect which was accorded to his father. All we know of this restriction of suffrage is from the election writs issued to the sheriff in this year, which required the summons of all the freemen having "within said County Visible seated Plantations of fifty acres of Land at the least or Visible personal Estates to the value of forty Pounds Sterling at the least," to the county court, there to elect delegates of similar property qualifications to the Assembly. The poorer classes no longer had any representation in the Assembly. The Assembly now contained very few of the members who served in 1669. This Assembly was continued by prorogation until 1676, and almost the same members reappeared in that year. It is significant that these Assemblies gave the Governor but little trouble.

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<sup>1</sup> II. Council, 76.

<sup>2</sup> Burk's Virginia.

<sup>3</sup> II. Council, 80.

<sup>4</sup> Lib. R. R. 106.

The Assembly of 1671, while passing nearly everything demanded by the Governor, still maintained some of the independence of the other Assemblies. The Lower House immediately demanded of the Governor why all the members elected had not been summoned to attend. The Governor answered that the sheriffs of Kent, Dorchester and Somerset counties had asked him, in the name of their "poor counties," to summon only as many delegates as formerly, which he did.<sup>1</sup> This explanation satisfied the Lower House, and so a way was left open for the future summoning of such and as many members as the Governor pleased, a right that was to be fiercely disputed in future Assemblies and to be a constant source of irritation.

The time of the Assembly was largely devoted to passing the act giving to the Proprietor two shillings per hogshead of exported tobacco. The Lower House wished to make the tax twelve pence and to limit the operation of the act to three years, but the Upper House, by several concessions, induced the Lower to pass the act making the tax two shillings and extending the operation "dureing the Natureall life of the Right Honble Cecilius now Lord & Proprietary of this Province and for one Cropp more next after his decease."<sup>2</sup> This important act provided that one-half of the tax was to be expended in maintaining arms and ammunition for the defense of the province and in defraying other "necessary charges of the Government."

By the wording of the act it can be seen that the Governor and councillors were paid from this fund. The act also provided that no public levy should be laid without the consent of the representatives of the freemen in the Assembly; that tobacco was to be receivable for quit-rents and alienation fines at two pence per pound, which was quite a concession; also that the act granting the Muster Master-General a fee be repealed, and that the clause which made all the charges of such a war assessable on the inhabitants,

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<sup>1</sup> Assem. 240, 241.    <sup>2</sup> II. Assem. 249, 255, 256, 257, 258, 260, 284.

be suspended in the act for levying war within the province. All of these provisions were concessions of the Upper House to the Lower. What the preceding Assembly had striven to accomplish was obtained by this Assembly in exchange for the continuation of the tobacco tax. In an act establishing the value in Maryland of foreign coins it was especially provided by the Upper House that the two shillings per hogshead were to be paid in English money sterling. The exportation of money was strictly forbidden.<sup>1</sup>

An act was also passed against "divulgers of false news," which was extended so as to mean any reports about the justices of the Provincial or the county courts.<sup>2</sup> This act was bound to prove of great service to the Proprietary government in suppressing any kind of disorder, and, with such a government, would certainly be used in a manner to awaken resentment.

An act was read for the "founding & Erecting of a School or College within this Province for the Education of Youth in Learning & Virtue," but the Lower House demanded that the teachers should belong to the Church of England, or else one should be a Catholic and another a Protestant, and the Protestants should have liberty to choose their teacher.<sup>3</sup> This was a moderate request, since Protestants were known to be the more numerous party, but the project was abandoned.

A naturalization act was proposed, but that also seems to have failed.<sup>4</sup> As usual, fees were considered. Those of the county, Provincial Court clerks, the county seal, the Coroner and the Chancellor, who always looked out for

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<sup>1</sup> II. Assem. 264, 286.

<sup>2</sup> II. Assem. 258, 260, 273.

<sup>3</sup> II. Assem. 262, 263.

<sup>4</sup> II. Assem. 249.

The effort of the Lower House to have the sheriff of Talbot County deprived of his office took up most of the session and is interesting. It shows how the county justices were often members of Assembly who would not if they had not been justices. II. Assem. 244, 246, 250, 251, 254, 265, 266, 267, 268, 269. This case again came up in the Assembly of 1674 (II. Assem. 258, 357), and again the sheriff is almost self-condemned.



himself, were regulated.<sup>1</sup> The powers of the County Commissioners were extended. They were empowered to levy tobacco for the payment of the county charges by an "Equall Assessment of the goods and chattels of the free-men and inhabitants" of the county.<sup>2</sup> This is the beginning of the present taxing power of the County Commissioners, by which all county taxation is levied.<sup>3</sup>

At the second session of this Assembly of 1671 the city of St. Mary's was for the first time represented. It had two members—John Morecroft, who had been so bitterly attacked by the Assembly of 1669, and Thomas Notley, who was a stickler for the Proprietor's privileges.<sup>4</sup> Notley was chosen Speaker.<sup>5</sup> The reasons are seen in a letter written by Charles Calvert to his father: "Mr. Notley is now Speaker of our Assembly; hee and Mr. John Morecroft beinge Chosen Burgesses for the Citty of St. Maries, And by that Meanes I gott him into the Assembly. Though Doctor Wharton bee a good understandinge Man yett Dr. Morecroft is much more for our purpose, being the best Lawyer in the Country, and has always been (upon other Assemblies) a great Assertor of yor. Lopps Charter and the Rights & Privilidges thereof, I durst not putt itt to an Election in the Countyes Butt tooke this way which I knew would certainly doe what I desired And now I haue gott Mr. Nottley into the Chaire, I haue Assured him, That with yor. Lordships Leauē, I am resoluēd to Keepe him there as longe as hee and I liue together, It is most Certaine that some of the Catholiques in the Assembly Did not behaue themselues as was Expected, hereafter they will I hope Endeauour to understand themselues Better And their owne Interest."<sup>6</sup>

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<sup>1</sup> II. Assem. 263, 292, 294.

<sup>2</sup> II. Assem. 273.

<sup>3</sup> The importation of slaves was encouraged (II. Assem. 272); standard weights and measures ordered for each county (II. Assem. 279); and practically the same land laws were re-enacted (II. Assem. 276, 305) as those of 1663, which had been vetoed by the Proprietor as announced in 1669.

<sup>4</sup> II. Assem. 311.

<sup>5</sup> II. Assem. 312.

<sup>6</sup> I. Calvert Papers, 264.

It is easy to see why St. Mary's City, as it was called, obtained representation in the Assembly. It is easy to see that the prerogatives of the Proprietor and the interests of the Catholic inhabitants of the province were the chief objects of the solicitude of the Proprietor and his son the Governor. That the Catholics did not always act with moderation is apparent. In all the following Assemblies we find the Lower House, whenever it did not pass what the Governor wished, called to conferences by the Upper House, its reasons demanded for rejecting an act, and in certain cases the Governor made angry addresses to them. The Lower House was tampered with continually.

When assembled, the Lower House petitioned that the Governor should issue a writ for the election of a member from Dorchester County in place of a sitting member, a right which it soon declared belonged to the Speaker.<sup>1</sup> The Lower House wished to limit appeals from the county to the Provincial Court, in actions of debt and trespass, to cases exceeding six hundred pounds of tobacco, but the Upper House would not agree "in prohibiting Appeals from the County Court to the Provincial Court in any action whatsoever."<sup>2</sup> These small cases were very vexatious, but the Upper House was practically the Provincial Court, which fact explains everything.<sup>3</sup>

Baker Brooke was now appointed Surveyor General,<sup>4</sup> and in the instructions sent him he was ordered to hold courts of "Enquiry and Survey" once a year in each county to examine the right and title of any one's claim to land, whether any one held more land than he should, and what rents and services he should pay to the Proprietor. A yearly report

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<sup>1</sup> II. Assem. 313.

<sup>2</sup> II. Assem. 314.

<sup>3</sup> About all this session did was to strengthen the act forbidding clerks and sheriffs to plead as attorneys in their own courts, by including all sub-clerks and deputy sheriffs and enlarging the penalty. II. Assem. 322.

<sup>4</sup> II. Council, 85, 94.

of the proceedings was to be made to the Proprietor and the Receiver General.<sup>1</sup>

At about the same time the sheriffs, each for his own county, were directed to make a perfect rent roll and deliver it to the Governor.<sup>2</sup> William Talbot, the nephew of the Proprietor and Secretary of the province, appointed Robert Ridgely chief clerk of the Provincial Court (a place evidently well worth having),<sup>3</sup> and Register and Examiner of the High Court of Chancery and Keeper of the Lesser Seal.<sup>4</sup> The Council, on one occasion at least, ordered letters of administration issued.<sup>5</sup> It is therefore likely that Ridgely did not have powers of judge of probate, but that these went to the Council.<sup>6</sup> When Talbot's commission was revoked, the Chancellor was made probate judge and grantor of letters of administration.

Fendall was sued for the thirds of a vessel seized in 1659,<sup>7</sup> a charge trumped up on the basis of a rumor.<sup>8</sup> It was but a few days later (Dec. 6-15) that a certain Lewis was bound over to the Provincial Court for uttering seditious words.<sup>9</sup> At the same time action was taken against Gerrard, who now lived in Virginia, for taking an Indian from the province without the consent of the Governor.<sup>10</sup> An ordinance was issued erecting Worcester County,<sup>11</sup> and a high con-

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<sup>1</sup> II. Council, 95.

The Proprietor's manors are to be looked after, and for every 50 acres only 15 pole are to be surveyed on any creek or river. II. Council, 94.

<sup>2</sup> II. Council, 91.

<sup>3</sup> II. Council, 23.

<sup>4</sup> II. Council, 88.

<sup>5</sup> Lib. R. R. 14.

<sup>6</sup> A curious order of the Governor's reveals the fact that while Talbot deputized Ridgely as chief clerk, Ridgely employed a white slave to do all his work, thus showing that modern methods of holding clerkships were thoroughly understood at that time. Lib. R. R. 16.

<sup>7</sup> I. Council, 361.

<sup>8</sup> II. Council, 103. Morecroft was the Attorney General in this suit.

<sup>9</sup> Lib. R. R. 13.

<sup>10</sup> Lib. R. R. 15.

<sup>11</sup> II. Council, 108.

stable was appointed for it until a sheriff was named.<sup>1</sup> There was a disturbance in this county at that time.<sup>2</sup>

The sheriffs were directed to make lists of all escheated lands in their counties, with the quality of the land and the improvements upon it, and return them to the Governor.<sup>3</sup> In the next Assembly the Lower House objected to escheats being made after three years' non-payment of rent, and asked that all instructions to the Governor concerning land be published within six months after receipt by the Governor, and that the Proprietor take no advantage in the future from the act for deserted plantations.<sup>4</sup> Promise of the publication of land instructions was all that was obtained.<sup>5</sup> William Calvert was now appointed Secretary.<sup>6</sup> Grants of land were made to him, and he had the power of appointment of all the clerks of the county courts, except that Henry Darnall was to remain clerk of the Calvert County Court. Darnall was a relative of the Proprietor. Calvert County being the largest county in population, its clerkship was the most lucrative. Darnall was also elected to the next Assembly.<sup>7</sup> Baker Brooke's interests were looked after by the Governor, who increased his fees by a proclamation, afterward ratified by act of Assembly.<sup>8</sup> The Governor, however, was authorized by the Proprietor to name deputy surveyors, and he also appointed the Attorney General.<sup>9</sup>

The same Assembly again met in 1674, Notley being continued Speaker.<sup>10</sup> The Upper House proposed an act for the levying of war without the province, the expenses of such war to be levied upon the freemen of the province.<sup>11</sup> This was in direct violation of the act of 1671 for the sup-

<sup>1</sup> II. Council, 107.

<sup>2</sup> II. Council, 111. II. Council, 122.

<sup>3</sup> Ordinances forbidding the export of certain commodities now began to reappear (Lib. R. R. 34; II. Council, 105), and another ordinance established a public ferry. II. Council, 118.

<sup>4</sup> II. Assem. 356.

<sup>5</sup> II. Assem. 372.

<sup>6</sup> Lib. R. R. 23.

<sup>7</sup> II. Assem. 345.

<sup>8</sup> Lib. R. R. 21; II. Assem. 372, 392.

<sup>9</sup> Lib. R. R. 23, 35.

<sup>10</sup> II. Assem. 346.

<sup>11</sup> II. Assem. 378, 380.



port of the government<sup>1</sup> and it was rejected by the Lower House.<sup>2</sup> The Lower House, doubtless knowing what was wanted by the Governor, proposed instead, that the act of 1671 be extended so that the two shillings per hogshead be paid not only to the then Proprietor during his life, but also to Charles Calvert during his life. The Proprietor,<sup>3</sup> Charles Calvert, wanted even more favors, but the Lower House refused to yield.<sup>4</sup>

The Lower House wished to know what laws had been assented to by the Proprietor since 1659, to which query the Governor made the unsatisfactory response, that he knew "no Laws assented to by the Proprietor but what are mentioned and can be found in the body of the Laws."<sup>5</sup> This was a direct evasion of the question. The Governor signed all laws, the "Lord Proprietor willetth these to be Laws," but this was not the Proprietor's assent. If the Proprietor assented the law could only be repealed by act of Assembly, whereas if he did not, a veto could be produced at any time, as was done in 1669. Thus there remained the large element of uncertainty as to the laws. But this strengthened the Proprietor's government. In 1674 the Lower House knew of only thirty laws assented to by the Proprietor.

The Quakers at this time presented a petition to the Assembly that they might be relieved from taking oaths, as was the case in the Carolinas, New Jersey, Rhode Island, and Jamaica, but obtained no relief.<sup>6</sup> The same subject was considered in the Assembly of 1675 in regard to the granting of letters of administration without oath, but no concession was obtained. In 1676 the Quakers again vainly asked relief.<sup>7</sup> The usual excuse, that the Proprietor's ideas on the

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<sup>1</sup> II. Assem. 284.<sup>2</sup> II. Assem. 381.<sup>3</sup> II. Assem. 381, 386.<sup>4</sup> II. Assem. 382, 384.

The Lower House having repealed some laws, the Upper House demanded the reasons, which were given them. II. Assem. 358, 359, 361.

<sup>5</sup> II. Assem. 374.<sup>6</sup> II. Assem. 355, 356.<sup>7</sup> II. Assem. 492.

subject were not known, did not satisfy, for the Proprietor, the same Charles Calvert who had offered all the excuses, was actually in the province.

The Assembly of 1674 decided that members of the county grand juries should pay their own expenses and that none but freeholders should be summoned.<sup>1</sup> A poor man was not allowed to sit on the grand juries, nor could he have afforded to do so if allowed. Taxable persons were defined as all freemen above sixteen years of age, except ministers and priests, all native-born male children of sixteen years of age, all imported male servants of ten years of age, and all slaves, both male and female, of ten years of age. Sheriffs were to take bail<sup>2</sup> and to execute warrants and writs from public officers without fees.<sup>3</sup> The building of a State House and prison was resolved.<sup>4</sup> During the discussion as to this building, Charles Calvert demanded that the province erect him a brick house at public charge.<sup>5</sup> He also named St. Mary's as the proper location of the State House, refusing to consider a plan to have it erected in Anne Arundel County.<sup>6</sup> In passing an act for mending roads<sup>7</sup> the Governor tried to get a road past his own house.<sup>8</sup>

Another act was entitled "An Act to Reforme the Attorneys Councillors & Solicitors at Law of this Province to avoyde unnecessary Suites and Charges att Law." By this act only those attorneys named by the Governor could plead in the Provincial Court, and in the county courts only those

<sup>1</sup> II. Assem. 392.

<sup>2</sup> II. Assem. 411.

<sup>3</sup> II. Assem. 399.

<sup>4</sup> II. Assem. 404.

<sup>5</sup> II. Assem. 371.

<sup>6</sup> II. Assem. 377, 378, 379.

The Assembly also empowered the county commissioners to erect county courthouses at county expense. II. Assem. 413.

<sup>7</sup> II. Assem. 408.

<sup>8</sup> And this at a time when roads were scarce. II. Assem. 369. Besides the usual act to revive certain laws (II. Assem. 412), this Assembly passed an act to repeal certain laws, a new thing. II. Assem. 408. The act for court days was extended to embrace all the counties. II. Assem. 397.

named by the County Commissioners. The fees were also strictly regulated, with heavy penalties for overcharges.<sup>1</sup>

The Assembly of 1671 and 1674 met again in 1675. Notley was, of course, continued Speaker.<sup>2</sup> This Assembly did little but add another burden of taxation upon the people, and gave up in doing so what had been wrested from the Governor by the Assembly of 1671 and maintained by the Assembly of 1674, namely, that all charges of government should be borne by the Proprietor despite any law for levying war.<sup>3</sup> The expenses of a war were to be levied by an assessment per poll upon the taxables. Fifty thousand pounds of tobacco were to be levied by the Assembly during the year, whether for making war or peace. If the expenses should be more, they would be paid by the next Assembly.<sup>4</sup> The Governor and Council could levy war charges for the entire ensuing year from February to February.<sup>5</sup>

The Lower House had tried to fix this charge at twenty-five pounds of tobacco per poll,<sup>6</sup> but the Governor rejected this, saying he did not wish to be tied to any fixed sum.<sup>7</sup> The Governor was also given thirty thousand pounds of tobacco for entertaining the Council, of which nearly all were members of the Calvert family, during the twelve days of this session,<sup>8</sup> or, as a member of the Lower House put it, for keeping open house to all persons,<sup>9</sup> a method of gaining votes that is still known. The efforts of the Lower House to relieve the Quakers were of no avail, the Governor being adverse.<sup>10</sup> Cecil County was set off by the

<sup>1</sup> II. Assem. 409.

About the time, we may notice in passing, Utye was made a councillor; he was not, however, summoned to the next Assembly. II. Assem. 382.

<sup>2</sup> II. Assem. 422.

<sup>3</sup> II. Assem. 284, 386.

<sup>4</sup> II. Assem. 462.

<sup>5</sup> II. Assem. 463.

<sup>6</sup> II. Assem. 424, 446.

Even 15 lbs. was suggested. II. Assem. 444.

<sup>7</sup> II. Assem. 446.

<sup>8</sup> II. Assem. 432, 455.

<sup>9</sup> II. Assem. 454.

<sup>10</sup> II. Assem. 424, 427, 432, 444, 447, 448, 450, 455, 456.

The Lower House asked the Governor to have the Secretary

Governor, June 6, 1674,<sup>1</sup> but it had no delegates in this Assembly.

Cecilius Calvert, the second Lord Baltimore, died November 30, 1675. Charles Calvert became the third Lord Baltimore, Sole and Absolute Proprietor of Maryland. On the 4th of March, 1676, when the news reached him, he issued a proclamation declaring that his father was dead and that all sheriffs should proclaim Charles Calvert as Absolute Lord and Proprietor of Maryland.<sup>2</sup> All commissions, writs and processes were to continue as before. Baker Brooke was commissioned Surveyor General, Philip Calvert, Chancellor, and William Calvert, Secretary.<sup>3</sup> In fact, there was no official change, the appointments before this time having been what Charles wished. A new Assembly was called. The old one had been prorogued to this year.<sup>4</sup> Of this new Assembly we have only the journal of the Upper House. Of the six members of the Upper House five were members of the Calvert family, and the sixth was a great supporter of the Proprietor's privileges. The Proprietor was the presiding officer. Among the members of the Lower House were John Coode and Kenelm Cheseldine, who were to become better known.<sup>5</sup>

The Lower House presented as an humble petition for the future what in subsequent Assemblies was demanded as

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enter the laws made at the session of the Assembly in the book of laws (II. Assem. 440), being careful, as usual, of their records.

The usual attempt at regulation of fees was made. The fees of the county clerks were protected by the Upper House against the Lower House (II. Assem. 430, 448, 452), but the fees of the attorneys were again restricted. II. Assem. 432, 452, 467.

The sheriffs were relieved from taking bail (II. Assem. 434, 454, 458), and were ordered to seize tobacco for the quit-rents and public debts before seizing them for private debts. Lib. R. R. 50. The members of the provincial grand juries were to receive hereafter 2500 lbs. of tobacco for their expenses. II. Assem. 462. It may be noticed that the Lower House called itself a House of Commons (II. Assem. 440), and that the members refused to pay their own expenses. II. Assem. 458.

<sup>1</sup> Lib. R. R. 29.

<sup>2</sup> Lib. R. R. 50.

<sup>3</sup> Lib. R. R. 58.

<sup>4</sup> II. Assem. 435.

<sup>5</sup> II. Assem. 481, 485.



an immediate right, namely, that four delegates having been elected by each county and but two of them summoned by writ to sit in this Assembly, "by which meanes," they say, "Some of the Inhabitants of this your Lordshps. Province Seem dissatisfied and that they have not theire free vote," in the future all who should be elected be summoned to sit, and if any die or are removed, new writs should be issued to fill the vacancies.<sup>1</sup> They distinctly acknowledged that it was the Proprietor's right to summon as many from each county as he pleased, and only begged the above favor. The Proprietor granted the petition. How well he kept his promise we shall see. But he declared that it was contrary to the late Proprietor's declaration for the settlement of Assemblies. He also declared that in the future every member of the Assembly should, at his entrance in the House and before the election of the Speaker, take an oath of fidelity to the Proprietor and to his heirs and successors.<sup>2</sup>

From this Assembly, as from preceding ones, Charles Calvert obtained concessions. First, all the tobacco then in his hands, for whatever purpose raised, was given to him.<sup>3</sup> The act granting the duty of two shillings per hogshead during his life was extended throughout the life of Cecilius Calvert, his eldest son.<sup>4</sup> This, it was said, was upon Notley's motion.<sup>5</sup> Thus the duty was made hereditary. An act "for the Security and Defence of this Province"<sup>6</sup> provided that all the expense of any war was to be raised by an equal assessment upon the persons and estates of the inhabitants of the province.<sup>7</sup> Persons enlisted in the trained

<sup>1</sup> II. Assem. 507.<sup>2</sup> II. Assem. 508.<sup>3</sup> II. Assem. 510.<sup>4</sup> II. Assem. 510, 515.<sup>5</sup> II. Council, 141.<sup>6</sup> II. Assem. 557.

<sup>7</sup> Provision was also made for pensions for disabled soldiers and the widows and children of soldiers, which were to be paid yearly from the public levy. When the levy was laid by the Governor and Council one delegate from each county was to be present to see that the tobacco was defrayed for the necessary charge of the province, a provision resisted by the Proprietor until the Lower House declared that these delegates would have no power to refuse any part of the levy. II. Assem. 492, 497, 498.

bands, who neglected to appear at the training place when summoned, were fined fifty pounds of tobacco, which went to the Proprietor. It was proposed at first to give these fines to the County Commissioners, but they were finally given to the Proprietor. The Proprietor wanted the fine to be one hundred pounds of tobacco for the first offense and two hundred pounds for every subsequent one, and that the fines be given to the "Lord proprietary or his Chiefe Governr. and Councell and Not to the Commissioners of any County, it being inconsistent With his Lordships Honor."<sup>1</sup>

The Quakers received scant consideration in this Assembly.<sup>2</sup> A large part of the session was taken up by the impeachment of Trueman for killing several Indians who had come into his camp under a flag of truce.<sup>3</sup> He was found guilty, but was protected by the Lower House, which wished to impose a fine only and claimed to be the judge of his punishment in drawing up the bill of attainder, a view disputed by the Upper House.<sup>4</sup>

The question of fees was again discussed. The Lower House decided that a committee, together with the Chancellor and Secretary, should draw up a law for the fees of all officers whatsoever, so that it might be confirmed while the Proprietor was still in the province.<sup>5</sup> Both the Chancellor and Secretary claimed fees between them.<sup>6</sup> The act as passed limited the fees of the Chancellor and Secretary, the Surveyor General and his deputies, the sheriffs, the coroners, and the criers of the county courts.<sup>7</sup>

<sup>1</sup> II. Assem. 491.

<sup>2</sup> II. Assem. 492.

Another act enjoined the constables to take the list of taxables in their hundreds during the last part of June. Taxables were all males of sixteen years of age, except ministers, priests, and paupers, and all female slaves over 16 years of age. II. Assem. 538.

<sup>3</sup> II. Assem. 474, 475, 476, 481, 482, 485, 493, 494.

<sup>4</sup> II. Assem. 500, 501, 503, 511, 512.

<sup>5</sup> II. Assem. 477.

<sup>6</sup> II. Assem. 489, 499.

<sup>7</sup> II. Assem. 532.

It will be noticed that the act is practically taken up with the Chancellor's and Secretary's fees. At this time one man could be sheriff, coroner, and deputy surveyor. II. Assem. 499. An act

The property of a certain Robert Cager had been left by him for the maintenance of a Protestant minister in St. George's and Poplar Hill hundreds, but it was settled upon the mayor, recorder, aldermen and common council of St. Mary's City and their successors. The Proprietor declared he knew no other way, St. Mary's being a corporation and capable of receiving the grant for the intended uses.<sup>1</sup>

The whole body of the laws was reviewed from at least 1640, and an act was passed, one part of which repealed a great number of laws and another part absolutely confirmed many others, in all one hundred and twenty-seven acts being repealed and seventy acts were confirmed.<sup>2</sup> An act was passed, as usual, reviving certain temporary laws.<sup>3</sup> The Proprietor refused to assent to the laws of this session as perpetual but only as temporary laws.<sup>4</sup> Of the perpetual laws, many were for the benefit of the Proprietor<sup>5</sup> and confirmed

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was passed prohibiting the importation of convicts into the province (II. Assem. 540), and another act limited suits for debt in the Provincial Court to sums over 1500 lbs. tobacco, except upon appeal from a county court. II. Assem. 537. Appeal at the common law was declared unusual and not according to the laws and practice of England, but since convenient and necessary in the province, and admitted by the justices of the Provincial Court to be in the nature of a *habeas corpus* to remove the case from an inferior to a superior court, it is so recognized. II. Assem. 562.

<sup>1</sup> II. Assem. 498, 530.

The city was to see that the profits of the property were devoted to the uses specified. It may be seen by the wording of the act that a clergyman was already there. The Lower House desired that the delegates' charges be assessed upon the whole province, and not for each county to pay for its own delegates, since some counties contained many more taxables than others, and the number of delegates from each county was the same. This was agreed, with the exception of traveling expenses, which were still to be borne by the counties. II. Assem. 509, 511, 514, 554.

<sup>2</sup> II. Assem. 542.

<sup>3</sup> II. Assem. 555.

<sup>4</sup> II. Assem. 512.

<sup>5</sup> Act touching judicature, act of recognition, act for the punishment of certain offenses, act concerning the levying of war within the province, act for the speedy payment of debts due the Proprietor, act concerning deserted plantations, act for the taking the oath of fidelity to the Lord Proprietary, the oath of fidelity to the Lord Proprietary.

his privileges. The oath of fidelity seemed especially hard to certain portions of the people, as we shall further see. The act for church liberties, passed in 1640, was confirmed. This, we may feel assured, was not very pleasing to the Protestants at a time when the Catholics in England were being restricted in various ways. The Act of Toleration was also confirmed. This again was more beneficial to the Catholics than Protestants.

*The Rebellion of 1676.*—Of the disturbance in Maryland during this year no mention is made, even by McMahon.<sup>1</sup> There seems to be an entire ignorance of the fact that there was a rebellion. Maryland is congratulated by her historians on having escaped the troubles that distracted Virginia. But there was a rebellion, nevertheless. Bacon's rebellion in Virginia had a profound influence upon Maryland, where much the same causes for popular discontent existed. That the Maryland rebellion was not as formidable as that in Virginia was due to the absence of any such a leader as Bacon, whose death was the knell of rebel hopes in both provinces. The use of the poll tax, the restriction of the suffrage in 1670, the heavy taxation, and the common idea that the provinces were but poorly protected against the Indians by the Governors,—all these causes of discontent existed in both provinces, and in both they caused a rebellion.

At this point the family connections of the Proprietor should be examined for a proper understanding of the situation. Upon the death of Henry Sewall, Secretary of Maryland, Charles Calvert married his widow, who was a daughter of Vincent Lowe. By Henry Sewall she had five children—Nicholas, Elizabeth, Anne, Mary and Jane. Nicholas married a daughter of William Burgess, Elizabeth married Dr. Jesse Wharton, Anne married Colonel Ben-

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<sup>1</sup> It is but just, however, to state that McMahon never saw Libers RR, RRR, and Council Book 1677-1683 of the Council Proceedings, all of which were in the possession of John P. Kennedy, who never put them to any use. They were recovered in 1895.



jamin Rozier, Mary married Col. William Chandler, and Jane married Philip Calvert. The dates of these marriages are known only approximately. These various unions are really of great significance, as every one who became related to the family soon obtained an office. The family being of moderately large proportions, the government of the province became a family affair in more ways than one, to the great discontent of outsiders. Elizabeth had been married to Dr. Jesse Wharton; accordingly Wharton was appointed Deputy Governor when the Proprietor went to England. The appointed Governor was Cecilius Calvert, the Proprietor's eldest son, who was only nine or ten years of age. He exercised no power, but simply drew a certain amount of fees. Philip Calvert, William Calvert and Baker Brooke, all close relatives of the Proprietor, were continued in their offices of Chancellor, Secretary and Surveyor General. Wharton was the Chief Justice.<sup>1</sup> Samuel Chew, Vincent Lowe, the Proprietor's brother-in-law, Thomas Notley and Thomas Taylor, favorites of the Proprietor and strong upholders of his privileges,<sup>2</sup> were appointed councillors. The changes from this time until 1689 put even more members of the family into office, and created more offices into which to put relatives.

Leaving the government thus established, the Proprietor sailed for England in the spring of 1676. He had been gone but a few days when the Indian war broke out that was the immediate cause of Bacon's rebellion in Virginia. The Five Nations, especially the Senecas, had often before made inroads upon the province. Having received a severe check in their Canadian forays,<sup>3</sup> they turned their attention to the English. The war in Virginia was fought mainly against nearer tribes of Indians. In Maryland the Senecas seem to have been the chief enemies.<sup>4</sup> Before the first of

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<sup>1</sup> Lib. R. R. 84.

<sup>2</sup> Calvert Papers, 264; II. Council, 141.

<sup>3</sup> Parkman's *Ancien Régime*.

<sup>4</sup> Rewards were offered to friendly Indians of five match-coats for every Indian prisoner they should deliver to the English, and

August Wharton died, and by his will named Notley Deputy Governor,<sup>1</sup> as his instructions ordered him to do.<sup>2</sup> The Susquehanna Indians asked for peace, and it was resolved to treat with them, but their relations with Virginia were first to be ascertained.<sup>3</sup> Here we begin to see indications of Bacon's rebellion, in Notley's expressed doubt as to what really was the government of Virginia.<sup>4</sup> A letter signed by Notley, Philip Calvert, William Calvert and Baker Brooke was sent to the Proprietor, in which they stated that they suspected Col. Bacon would pursue the Pascattoway Indians into Maryland, as a pretext to enter the province and "uphold young Giles Brent's vain title to his mother's crown and scepter of Pascattoway," thus putting "that Brute savage" at the head of all the needy and desperate persons in those parts, to the great disquietude of the province.<sup>5</sup> An early supply of arms and ammunition was accordingly asked.<sup>6</sup>

The head men of the Pascattoway and Mattawoman Indians having been sent for, the Council told them that a man named Bacon might come into the province to annoy them, but that he had no license to do this, and as he had no license, they could defend themselves against him without blame. The Indians were also told not to go into Virginia,

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three match-coats for every scalp. Lib. R. R. 61. The Indian scare is also shown by the fact that despite the general contempt entertained for Indians, orders were given that if any private soldier should strike a friendly Indian he should ride the wooden horse, run the gauntlet, or endure some similar punishment as a court-martial might direct. Lib. R. R. 77. An order was passed for the people to fortify their houses, but the number of men in such houses was limited to ten. A council of war was ordered. Lib. R. R. 77.

<sup>1</sup> Lib. R. R. 87.

<sup>2</sup> Lib. R. R. 86.

<sup>3</sup> Lib. R. R. 95.

<sup>4</sup> Lib. R. R. 96.

<sup>5</sup> Young Brent's mother was Empress of the Pascattoways. Brent's motive in marrying her was perhaps the expectation of controlling the large tract of land set apart for these Indians by the Proprietor.

<sup>6</sup> Lib. R. R. 98.

as that would give Bacon a pretext to attack them. They were urged, if they had murderers among them, as the Virginians said, to hand them over.<sup>1</sup>

It has been seen that the Council feared an invasion by Bacon in support of Brent, who would put himself at the head of all needy and desperate persons. On the fourth of September, less than three weeks after the talk with the Indians, the Governor issued a proclamation against Davyes, Gent, Hasleham, Pate (perhaps a relative of that Major Pate at whose house Bacon died) and others, for having contrived a seditious paper<sup>2</sup> threatening the subversion of the Lord Proprietary's government, as well as of the constitution of the Assembly, the true preserver of liberties. All this, it was claimed, tended to the ruin of the freeholders and housekeepers, and the taking away of liberty and true property in lands and goods. The proclamation went on to state that they had gathered together sixty armed men in Calvert County to extort certain grants and immunities from the Governor and Council which were not in the power of the Governor and Council to grant.<sup>3</sup> These demands, the Governor announced, he would place before the next Assembly, and he ordered the mutineers to disperse. This offer was rejected by Davyes and the others, the Assembly being packed in the interest of the Proprietor.

Bacon's Rebellion in Virginia was now (September) at its height, and it seemed as if the popular party would gain everything. In Maryland also the popular party expected to make great gains. The Governor ordered the arrest of Davyes, Gent, Hasleham and Pate, who, according to Virginia testimony, were men of most reputable character,<sup>4</sup> and offered pardon to the others if they promptly submitted.

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<sup>1</sup> Lib. R. R. 99, 100.

The Council offered to include them in the treaty with the Susquehannas, but the Indians refused, and on being asked if they would march against the Susquehannas, expressed entire readiness. Lib. R. R. 100.

<sup>2</sup> Certainly issued before September 1. Lib. R. R. 105.

<sup>3</sup> Lib. R. R. 102.

<sup>4</sup> Force's Tracts, Vol. 1.

In a proclamation by the Governor as early as the first of September, it was stated that the seditious paper just noticed had been read to the troops under Henry Jowles by force of arms.<sup>1</sup> This statement shows the sympathy of the troops for the movement, and perhaps the sympathy of Jowles, if we consider the part he played in 1689.

But suddenly the whole aspect of things was changed by the death of Bacon. The Virginia rebellion, deprived of its leader, immediately collapsed, and the Maryland rebellion was also at an end. The Governor appointed a special court to inquire into the late mutinies and seditions.<sup>2</sup> A remonstrance of the Governor and Council to the people was published, which shows the causes of complaint and silently refuses relief.<sup>3</sup> The heavy taxes were declared to be due to the Indian wars, the building of the State House and the Davyes rebellion. As to freemen of no property having no vote in electing delegates to the Assembly, the same was true at this time in Virginia and Barbadoes, and in England, where it was also true of women with land, or any one owning personal property and not within a corporation. The Governor and Council promised, however, to ask the Proprietor to let all freemen vote in the election of delegates to the next Assembly, the Proprietor alone having the power to allow this. In regard to the complaint that the poor paid as heavy taxes as the rich, the Governor and Council replied that they each paid for their head and the rich paid also for their servants' heads. That the same system of taxation was used in Virginia and the West Indies, but if it was wrong it could not be changed by the Proprietor nor by the Governor and Council, but only by an act of Assembly, and no doubt the Proprietor would joyfully consent to an act changing the system of taxation, and would be glad to see permanent and not transitory riches. These complaints were much the same as those in Virginia, where heavy taxes for the benefit of officials and for Indian wars

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<sup>1</sup> Lib. R. R. 105.<sup>2</sup> Lib. R. R. 103.<sup>3</sup> Lib. R. R. 106.



not meant to hurt the Indians, the restricted franchise and the poll tax, were popular grievances. It was also demanded that all those born in Virginia be considered free-born subjects of England. This same demand was repeatedly made in Maryland. Laws had been made in Maryland as early as 1663 that the possession of property be confirmed in the occupants. It was further demanded in Virginia that the export duty of four shillings per hogshead tobacco be applied to defraying the expenses of the government and not appropriated by the Governor. In Maryland, as has been seen, this same duty was levied, and it was charged that very little of it went to pay the expenses of the government.<sup>2</sup> The poll tax, which imposed the same burden upon the poor and the laborer as upon the rich, was felt severely and by the same persons who had lost the right of suffrage. It is this tax that the Maryland Bill of Rights, one hundred years later, declared to be "grievous and oppressive"; its imposition was prohibited.<sup>3</sup> To refer the taxation of wealth and the widening of the elective franchise to the Assembly, composed as it was of the wealthier classes, was clearly the destruction of both projects of reform.

The causes of dissatisfaction in Maryland may be learned from a paper that has received hitherto but scant attention, the famous "Complaint from Heaven with a Huy and Crye and a petition out of Virginia and Maryland."<sup>4</sup> This is an extraordinary document, full of hatred for Papacy and the Papists, but containing more truth in its charges than is usually supposed. The writer or writers of this paper show

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<sup>1</sup> Burk's Virginia, Vol. II., 162.

<sup>2</sup> Burk's Virginia, 242; Virginia Historical Magazine, II., 2.

<sup>3</sup> Not only are poll taxes forbidden, but the famous Art. 15, Md. Bill of Rights, declared that every one shall be taxed according to his real worth in real or personal property. The unpopularity of the poll tax in 1776 was due largely to its application to the support of the Established Church.

<sup>4</sup> II. Council, 134.

their Puritanical leaning in urging that New England was a good example of the way in which Maryland should have been settled.<sup>1</sup> Heavy taxation is complained of again and again. Great bitterness is shown over the taxes for the Indian wars. The Proprietor was charged with waging war simply for his own benefit and with having a desire to protect the Indians. The names of the members of the Provincial Court (identical with the Council) were given and the charge of nepotism (a charge entirely true) was made. The Governor (the Proprietor's son), the Deputy Governor, the Secretary, the Surveyor General, were all kinsmen. What seemed even worse, they were all Catholics. Other members of the Council, for example, Lowe, the Proprietor's brother-in-law, were inclined to Catholicism and not apt to oppose the Proprietor in anything. This was sure to be considered a grievance in a country where the Protestants outnumbered the Catholics.

The Assembly was then attacked. The charge was made that of the four delegates elected from each county, but two, selected for their pliancy to the wishes of the Proprietor, were summoned to the Assembly. This charge was true, and it was to be a fruitful source of contention in subsequent years. Another charge was the manner in which the Upper House, having the same members as the Provincial Court, ordered laws to be passed; and the pressure used, if the Lower House showed any resistance to the wishes of the Proprietor, was another true charge. The temporary nature of the laws, in consequence of the Proprietor's veto, was complained of, also the constant creation of new and heavy fees.

The corruption of members of the Lower House by offices was alleged. The charge was made that Taylor, while Speaker, was made a Councillor and Major General for having urged the export duty of two shillings per hogshead of tobacco. Notley, for having urged, while Speaker, that

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<sup>1</sup> II. Council, 140.

this duty be made hereditary, was made Deputy Governor upon Wharton's death. The charges were undoubtedly true. The entire history of this export duty was discussed, from the act of 1647 to that of 1676, though not with accuracy. The paper declares that no complaint was made against real and necessary taxes, but only against those "to maintain my Lord and his Champions in their prince-ship." The export duty, quit-rents, port duties, fines, escheats, entering and clearing of ships, licenses and fees, were named as sources of revenue for the Proprietor, besides a large number of Proprietary manors, so that to the poor man the taxes were unbearable. Yet there was no protection against the Indians.

The Proprietor was charged with open violation of several laws, such as the one whereby sheriffs were to be appointed from certain nominees suggested by the County Commissioners, to serve for only one year. This act was certainly disregarded. The establishment of the towns by the Proprietor was denounced. They had been erected on "50 or 100 acres without commons or possibility for poore people to live in." That a great many settlers came as servants to others was confessed, but it was claimed they were entitled to equal consideration.

The question of taking the oath of allegiance to the Proprietor was given much attention. The Proprietor was forcing all to take this oath, contrary to the agreement made between the Proprietor and the Puritans in 1658, whereby the oath of fidelity was not to be pressed upon the people, but an agreement to submit to and aid the Proprietor. All they owed to the Proprietor, men claimed, was fealty as tenants, while allegiance and fidelity were due only to the King. But the Proprietor arrogated to himself royal power. He set up his coat-of-arms in all the courts. He administered justice in his own name and denied all appeals to the King. And yet for refusal to take the oath of fidelity "they begin to hang and fine people." In a remonstrance issued to the people the public grievances were

acknowledged and promises were made that all the elected burgesses should be summoned to the Assembly. Reference was also made to the proclamation<sup>1</sup> during the Indian war, by which only ten men were allowed to fortify themselves in any house, under penalty of being treated as rebels, an order no doubt due to the threatening attitude of the common people.

Maryland priests were accused of communicating with French priests living among the Five Nations, who were making forays into the province. The fear that in a war with France the Protestants might be attacked was distinctly expressed—a foolish fear, it seems to us now, but at that time it was very natural. In view of any such war the paper made an extraordinary proposal: that a Governor, “a Vice Roye or Governor Generallissimo from his Majesty,” be appointed over all the colonies. Thus Maryland can claim the historic honor of suggesting military unity for America at this early date.

Besides all this, some immediate measures of relief were asked: (1) That the King take the government of Maryland and appoint Governors, from whom the oath of allegiance and supremacy should be required. (2) That all disputes between the Proprietor and the people of the province should be decided by the King and Parliament. (3) That the two shillings per hogshead of tobacco, or any future duty, should be employed in supporting the Governor and defraying public expenses, such as the building of forts and the maintenance of troops. (4) That the Proprietor should not be allowed to oppress his tenants, but receive his quit-rents in tobacco at two pence per pound, as there was no other money in the province. (5) That Protestant ministers, free schools and glebe lands, should be established in every county and maintained by the people. Also that the election of delegates to the Assembly should be by the freemen, and that those delegates should have free votes in the Assem-

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<sup>1</sup> Lib. R. R. 77.



bly and not be forced to pass acts by "respect, persuasion or compulsion." (6) That, in case of any emergency, the freemen should have free appeal to the King.<sup>1</sup> The act for taking the oath of fidelity to the Proprietor, and the oath itself, were then given in full, together with the punishments for mutinous speeches and attempts, with and without force, against the right and title of the Proprietor.

This petition, addressed to the King, was of no avail. It revealed sympathy with the movement in Virginia, to which the King was opposed. Measures hostile to Catholics could not gain the favor of a king who was himself a Catholic. The document was most probably written by members of Fendall's party. Gerrard's residence in Virginia<sup>2</sup> was, perhaps, a connecting link between the Virginia and Maryland movements. Perhaps Fendall himself assisted. Its intimate acquaintance with the proceedings during his term of office as Governor makes it probable. Certain it is that most of the complaints were true and in themselves sufficient causes for dissatisfaction. They were destined to overthrow the Proprietor's government when the favorable opportunity came in 1689.

In a letter of the Governor to the Proprietor, dated January, 1677, fear was expressed lest a rebellion should break out during the coming summer. The heavy taxes of 1676 and 1675 had "given occasion for malignant spirits to mutter." The Governor declared the hanging of Davis and Pate had terrified the people. There was now peace, "though never Body was more repleat with Malignancy and Frenzy then our people were about August last, and they wanted but a monstrous head to their monstrous body."<sup>3</sup> The prospects for peace, however, seemed bright since Bacon's rebellion had been crushed. He further de-

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<sup>1</sup> The King was asked to send over six or seven hundred Scotchmen, to be settled at the head of the bay as a bulwark against the French and Indians.

<sup>2</sup> William and Mary Quarterly, Vol. IV., I, p. 36.

<sup>3</sup> II. Council, 153.

clared that new men must be placed in power in Virginia, since the old ones would never agree with the common people.<sup>1</sup> He did not see the truth, that the same condition of things prevailed in Maryland. It was but a few days later that the Governor ordered the arrest of all persons fleeing from Virginia.<sup>2</sup> Nevertheless some Virginians received protection in Maryland. Among them was Nathaniel Bacon, Sr.<sup>3</sup>

The letter of John Yeo, a minister in Maryland, to the Archbishop of Canterbury, asking that Lord Baltimore make provision for the maintenance of ministers of the Established Church, is worth noting. The Committee for Trade and Plantations, considering that no provisions had been made for the maintenance of ministers in Maryland, called for a conference with Lord Baltimore. A short time after this, Lord Baltimore was asked to give an account of all the Protestants in the province, for example, how many congregations they would make and how much each parish would pay to support a minister.<sup>4</sup> The number of Dissenting preachers in Maryland was also asked. Lord Baltimore answered that the greater portion of the inhabitants of the province were Dissenters, the members of the Church of England being few in number, so that it would be very difficult to pass a law for establishment.<sup>5</sup> This was an extraordinary statement in view of the fact that such a law had already been passed by the Lower House at one time and discussed at another time, although in both cases defeated by his opposition. The Governors of Maryland had been expressly forbidden to assent to any such law. Such legislation was easily passed in 1692 when the Proprietor had no longer power to prevent it.<sup>6</sup> The committee decided that provision should be made for ministers of the Established Church, "to which," the account says, "my Lord

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<sup>1</sup> II. Council, 154.

<sup>2</sup> Lib. R. R. 109.

<sup>3</sup> III. Council, 168.

<sup>4</sup> II. Council, 252.

<sup>5</sup> II. Council, 133.

<sup>6</sup> It should be remembered, however, that no Catholics were allowed to vote or sit in this Assembly.

Baltimore seemed to consent." It is to be observed, however, that he did nothing.

In 1676 the Committee of Trade and Plantations had sent inquiries concerning Maryland to Lord Baltimore, of the most comprehensive kind,<sup>1</sup> to which he made answer in 1678,<sup>2</sup> carefully avoiding any mention of the export duty, declining to give an account of the revenues touching his own property, and insisting that there were scarcely any members of the Church of England in the province. He even tried to lead the committee to believe that the Act of Toleration was passed as soon as the colony was founded, instead of fifteen years later, as was actually the case. The outcome of all this agitation amounted to nothing. Lord Baltimore remained bitterly opposed to any act establishing the Church of England.

*The Struggle between the Proprietor and the Assemblies, 1676-1684.*—During this period the regulation of the election of the delegates to the Assembly was the chief, though not the only cause of dispute. Evidences of the state of unrest then existing in Maryland and Virginia are clearly seen. Several matters of minor importance may be noticed. The declaration of the Governor, that an act of Parliament of 1677<sup>3</sup> was in full force in Maryland, shows how legislation could be made for the province by such declaration without consent of the Assembly.<sup>4</sup> The county justices were ordered to make out the list of tithables,<sup>5</sup> the historic beginning of the power still exercised by the County Commissioners to sit as an Appeal Tax Court. A law of trespass, that is still in force, was then ordered.<sup>6</sup>

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<sup>1</sup> II. Council, 128.

<sup>2</sup> II. Council, 264.

<sup>3</sup> Against nuncupative wills. <sup>4</sup> Lib. R. R. 158. <sup>5</sup> Lib. R. R. 124.

<sup>6</sup> Hunting without a license was forbidden, nor was a license to be of any force on any man's land without his permission. Lib. R. R. 125.

Philip Calvert, although Chancellor, was empowered by the Proprietor to issue writs in the Court of Chancery in his own cases (Lib. R. R. 145), and the sending in of the alienations of land was pushed. Lib. R. R. 147.

An Assembly was called in 1678, to which all four of the elected delegates of each county were summoned.<sup>1</sup> To this Assembly Fendall was elected by Charles County in place of a certain Allen, deceased. This caused Notley to order the sheriff to announce to the electors that if they obstinately insist on electing Fendall to the Assembly they would lose a member, for, as had happened once before, he would not be allowed to take his seat.<sup>2</sup> This election shows the continued popularity of Fendall.

A Committee of Privileges and Elections was appointed to examine into the election returns and anything done against the privileges of the Lower House.<sup>3</sup> The defective records do not allow the proceedings of this committee to be followed very closely. The opinion of the House was asked by the committee, whether it was contrary to its privileges that any freeman, no matter of what estate, should be deprived of his vote. It is impossible to say what the answer of the House was to this question,<sup>4</sup> but an act passed by this Assembly continued the property qualifications. The committee asked if it was against the privileges of the House for a sheriff to sit in it during his term of office. To this the House must have answered it was against its privileges, for the committee subsequently reported that a sheriff was sitting in the House, contrary to its privileges.<sup>5</sup> The committee also asked whether the Attorney General could sit in the Lower House; whether its privileges were not infringed by the non-calling of all elected members to the last Assembly, and if it was not against its privileges that no one had been elected in place of a member who had died. To the first of these questions the Lower House seems to have answered that the Attorney General could sit; to the second it declared that its privileges were infringed, and to the third it answered that the Governor be asked to have another

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<sup>1</sup> Council Book, 1647-1683, 41.    <sup>2</sup> Council Book, 1677-1683, 44.

<sup>3</sup> III. Assem. 6, 10.    <sup>4</sup> III. Assem. 12.    <sup>5</sup> III. Assem. 17, 19, 31.



member elected.<sup>1</sup> These things illustrate the temper of the Lower House.

An act directing the election and summoning of delegates to the Assembly was passed,<sup>2</sup> the Upper House taking care to preserve the representation of St. Mary's City, but yielding to the resistance of the Lower House to a more stringent property qualification.<sup>3</sup> This act simply recognized existing custom. The property qualification was made the same as that provided by the writ of 1670, viz. a freehold of fifty acres of land or a visible personal estate of forty pounds.<sup>4</sup> The delegates from St. Mary's City were to be chosen as before, by the Mayor, Recorder, Aldermen and Common Council of the city. No sheriff, deputy, or ordinary-keeper was to be elected. Four delegates were to be elected by each county, and they were bound to appear at the meeting of the Assembly without further summons. Neglected or illegal returns made by sheriffs were to be punished by a heavy fine. The Proprietor refused to assent to the provision of this law that four delegates be summoned from each county, and declared that, in the future, there should only be two delegates from each county.<sup>5</sup> This caused a contest with the Assembly of the year 1681, the same Assembly that made the law. As usual, the Lower House insisted on its privileges.<sup>6</sup>

The Proprietor having asked for an act of recognition of the Proprietor's power, so that soldiers might be better regulated, the Lower House demanded a copy of the charter and insisted that the Upper House sign it as a true copy. This the Upper House refused to do. The Lower House finding that an act for militia was all that was desired, consented to this, but expressed the desire that a true copy of the charter be made and placed in the Secretary's office.<sup>7</sup>

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<sup>1</sup> III. Assem. 17.    <sup>2</sup> III. Assem. 60.    <sup>3</sup> III. Assem. 24, 25, 31.

<sup>4</sup> Bancroft, Vol. I., 439, totally misapprehends this act. It is impossible to see where he obtained such a view of it as he presents.

<sup>5</sup> Lib. R. R. 184.

<sup>6</sup> III. Assem. 33, 34.

<sup>7</sup> III. Assem. 5, 6, 9, 10, 11, 12, 13, 14, 15.

The act for militia was then taken up and discussed.<sup>1</sup> There was but little change from a previous act of 1676. Priests, delegates, magistrates and constables were exempted from service. Booty was to be equally divided among the soldiers. Provisions were made against exaction by pressmasters, and the expenses of any war are to be levied by equal assessment upon the taxables by the Assembly. To prevent the expense of too frequent meetings of the Assembly, however, the Governor and Council were empowered to levy the necessary charges, not exceeding 50,000 pounds of tobacco yearly.

The Lower House also passed an act that no sheriff should hold office longer than one year, according to the customs of England, but the Lower was induced by the Upper House to allow a longer term if the sheriff produced a certificate from the county court of just execution of his office, and provided no just causes of removal existed.<sup>2</sup> The Upper House tried to exempt Charles County from this law. That men were long-continued in this office and also as County Commissioners was true before this and afterward, and it was a great cause of complaint. The county courts were empowered to make rules, with fines on their non-observance, such fines to be used in the maintenance of the poor, but the proposal of the Lower House to give them power to hear and determine all civil causes whatsoever was defeated by the Upper House.<sup>3</sup> An act for the administration of estates without taking oath was defeated by the Upper House as usual.<sup>4</sup>

The following year Notley died,<sup>5</sup> but the Proprietor being

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<sup>1</sup> III. Assem. 18, 29, 34.

<sup>2</sup> III. Assem. 36, 39, 40, 68.

<sup>3</sup> III. Assem. 14, 23, 28, 70.

Fees were discussed as usual (III. Assem. 19, 49, 50), and an act passed limiting the fees of the clerks of the county courts. III. Assem. 73.

<sup>4</sup> III. Assem. 48.

It is hard to say whether the delegates' expenses were paid by their respective counties or by the province. III. Assem. 13, 46.

<sup>5</sup> Calvert Papers, 311.

in the province, no new Governor was named. During this year there was a quarrel of some kind between the Proprietor and Christopher Rousby.<sup>1</sup> Vincent Lowe, the Proprietor's brother-in-law, was named Surveyor General.<sup>2</sup>

Fendall was now again found in trouble. It was charged that he had made several seditious speeches. The evidence against him was that he had said he had been in much trouble and had suffered greatly in his estate but he hoped the time was coming for him to right himself. Also in talking of the troubles in England and the rumor that a frigate was coming after Lord Baltimore, he said it was useless, for if but three words were sent from England he could easily send Lord Baltimore to England. Another testified Fendall had said that he had been a great sufferer by the Chancellor, and that he believed the late poisoning of the people in St. Mary's was done by the Papists. Still another testified that Fendall said he had been a great sufferer through the Proprietor, the Chancellor and Wharton, and that he would have risen against Wharton if he had lived longer, but that he, Fendall, by threatening speeches had scared Wharton to death. About all that can be said with certainty from this evidence is that Fendall had said he had been a great sufferer, but it was sufficient to cause an order for his arrest. He fled, however, and the matter must have been patched up some way, as he soon afterward returned to the province.<sup>3</sup>

Another interesting matter was the trial of Dr. Barree for saying, as was proved by many witnesses, that a troop of one hundred Catholics had been formed to cut off all the Protestants.<sup>4</sup> The point to be noted is that he was himself a Catholic, and so the spread of such rumors by Protestants cannot be very surprising. Such rumors did arise, that the Proprietor furnished shot and powder to the In-

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<sup>1</sup> Council Book, 1677-1683, 68.

<sup>2</sup> Lib. R. R. 167.

<sup>3</sup> Council Book, 1677-1683, 80, 81, 82, 83, 84.

<sup>4</sup> Council Book, 1677-1683, 97, 98, 99, 100, 101.

dians to kill the Protestants, that he sent letters to the Senecas and the French, that the forty Irish families coming would be forty thousand Irish Papists to cut the Protestants' throats.<sup>1</sup>

A special court, consisting of Philip Calvert the Chancellor, William Calvert the Secretary, Henry Darnall and William Diggs, was appointed by the Proprietor to try all murders, insurrections, rebellions, mutinies, seditions, burglaries, unlawful meetings, and speaking of words against "Us or our dominion,"<sup>2</sup> but there is no evidence to show that such a court ever sat.

The proclamation now issued for the holding of an Assembly contained the Proprietor's dissent to the election law of 1678, two delegates from each county being declared sufficient,<sup>3</sup> which fact caused considerable discontent, the people holding that the law of 1678 could not be thus overridden.<sup>4</sup> The complaint was also made that anything said by a Protestant was immediately carried to the Proprietor. Undoubtedly the so-called Papist Plot in England created much excitement in Maryland, as did likewise the bill to exclude the Duke of York (James II.) from the succession to the crown.

It will be seen that occasion was soon contrived to have Fendall again arrested. The Assembly was not called until August, 1681, when the Proprietor made his declaration that there should be only two delegates from each county. He also issued a proclamation about the same time for the enforcement of the laws against divulgers of false news.<sup>5</sup> The cause of this proclamation, as stated by the Proprietor, was the attempt of certain evil-disposed persons to stir up the inhabitants of Maryland and Northern Virginia to mutiny.<sup>6</sup> Fendall and Coode he had ordered to be arrested as "two

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<sup>1</sup> Council Book, 1677-1683, 175, 207, 226, 237.

<sup>2</sup> Council Book, 1677-1683, 181.

<sup>3</sup> Council Book, 1677-1683, 201.

<sup>4</sup> Council Book, 1677-1683, 225.

<sup>5</sup> Lib. R. R. 186.

<sup>6</sup> II. Council, 280.



Rank Baconists," and he declared that the people of Virginia were as ready as ever to rebel. Fendall, who had great influence over the "Rascals of the North parts of Virginia," would have joined Bacon but for Notley's vigilance. The trials of Fendall and Coode will be noticed later. Much of the disturbance in Virginia was due to the attempt to establish towns. The Proprietor himself wished to do the same in Maryland.<sup>1</sup>

When the Assembly met the Proprietor asked for a severe act against "those wicked and Malicious persons who spread lies and false stories to the disquiet of good people, and the disturbance of the Government." The reason he had not called the Assembly earlier, he declared, was because the expenses caused complaint and that was the cause of Davis' rebellion in 1676.<sup>2</sup> He also declared that he had just nipped in the bud another rebellion. This address shows the unrest still prevailing in the province. An act was prepared against divulgers of false news by the Lower House, but it was rejected by the Upper as not providing sufficient punishment.

The Proprietor asked the Lower House not to allow Coode, who was accused of mutinous and seditious speeches tending to breach of the peace, to sit as one of its members. The Lower House said it would consider the matter and asked for the charges, which the Upper House refused to give, simply insisting that Coode, being accused of breach of the peace, was incapable of sitting as a member of the Lower House.<sup>3</sup>

The Lower House did not further consider the matter at that time, but insisted on the election of new members to fill the vacancies caused by death or otherwise. It was decided that the Speaker should issue the warrants according to the precedent of the Lower House of Parliament in England, and the Proprietor was asked to name some officer to

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<sup>1</sup> Burk's Virginia, 229.

<sup>2</sup> III. Assem. 110.

<sup>3</sup> III. Assem. 112, 113, 115, 116.

whom the Speaker could issue out the warrants.<sup>1</sup> The Lower House declared that all they wished was that the Assembly, having begun with four members from each county, should end with four. To this the Proprietor answered that the act for election of burgesses, with four delegates from each county, was to apply only to future Assemblies (this was still the Assembly of 1676), and he had, moreover, disapproved of that clause. The Lower House, he said, was a sufficiently full house.<sup>2</sup>

The Lower House now drew up an act for the election of delegates, in which they yielded to the reduction of two from each county, but provided that in case of any vacancy by death or otherwise the Speaker should direct a warrant to the Secretary, who should then issue a writ for a new election. With this the Upper House refused to concur, but insisted on the rights of the Proprietor. The Lower House insisted that it was the privilege of the House that the Speaker should issue such warrants.<sup>3</sup> The Proprietor expressed his surprise that the Lower House should claim a power that was not practiced in Virginia or in any other of his Majesty's colonies. It was impracticable; the King had power to dispose of his conquests as he pleased, and in granting the Proprietor his charter had given him the power to enact laws. Accordingly he had propounded a way for the settlement of future Assemblies, but would issue writs, this time only, for the filling of the Lower House with four delegates from each county.<sup>4</sup>

The Lower House now expressed its grief that the Proprietor should wonder that its members asserted their rights and privileges as coming from England rather than from imperfectly constituted colonies; it was their birthright by the words of the charter. If the word "conquest" meant that they were subject to arbitrary laws and impositions, they took leave to believe that they were not his lordship's

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<sup>1</sup> III. Assem. 114.

<sup>2</sup> III. Assem. 118, 119.

<sup>3</sup> III. Assem. 119, 120, 121, 122, 123.

<sup>4</sup> III. Assem. 124.

words, but the result of strange, if not evil, counsel. By the charter his lordship had sufficient rights and prerogatives, and the King had reserved to the people the rights and privileges of Englishmen, and this was all they insisted upon. If the Proprietor would issue the writs as he had said, the Lower House would proceed to business.<sup>1</sup>

The Upper House disclaimed any idea of likening the freemen of the province to a conquered people. It seemed for a time as if nothing would result, the Upper House trying to kill the affair by messages and disputes. The Lower House, however, refused to transact any business until the writs were actually issued, and showed considerable distrust of the good faith of the Proprietor. In the end they gained their point.<sup>2</sup> At the close of the session, however, the Proprietor declared his dissent to the election law of 1678.

Coode's case was again taken up, the Lower House refusing to unseat him for mere accusation of breach of peace, saying that only treason, felony and refusing to give security for breach of peace could unseat a member. The Upper House insisted that Coode had refused to give security, upon which the Lower House demanded the evidence. The Upper House declared that he could only be tried at the Provincial Court, but sent the evidence, which the Lower House refused to consider sufficient. Coode retained his seat.<sup>3</sup>

The act now passed for the regulation of the militia for the better defense and security of the province differs but little from previous ones. It occupied much of the Assembly's time. The Lower House talked much of its privileges, and failed to raise as much money for the Indian war as the Proprietor wanted.<sup>4</sup> This made the Proprietor angry.

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<sup>1</sup> III. Assem. 125.

<sup>2</sup> III. Assem. 126, 128, 129, 130, 131, 132, 133, 134.

<sup>3</sup> III. Assem. 135, 136, 137, 138, 139.

The Lower House requested the Proprietor to appoint a sergeant-at-arms for them. III. Assem. 115.

<sup>4</sup> III. Assem. 163, 170, 172, 175, 178, 180, 188.

The Lower House tried, but without success, to get an act passed for the confirmation of the laws. The Upper House declared useless the first part of the act, by which laws passed by the Assembly and assented to by the Proprietor could only be repealed by consent of the Assembly. The latter part of the act, by which the Governor's assent to a law was made binding on the Proprietor, was declared dangerous for the rights of the Proprietor. Neither the Governor of Virginia, nor William Penn in Pennsylvania, nor yet the Lord Lieutenant of Ireland, had any such power.<sup>1</sup> The Lower House answered that by the first part of the act it desired that the laws made at the last session (1678), which they held still to be in force, might not be repealed or disassented to without its consent. It denied that the latter part of the act was dangerous for the Proprietor or that the precedents quoted held good for Maryland. It also declared that "Nothing can or ought to be Satisfactory to us, or the Freemen of this Province (whom we Represent) unless we are Ascertained of the Validity force and Continuance of the Laws of this Province under which we live, and from whence we Expect protection and Safety and to the Enacting of which we have been and Still are Lyable to So much Trouble & Expence."<sup>2</sup> The Lower House tried in vain to get the consent of the Upper House to this act, nor did a petition addressed to the Proprietor have any better result. The Proprietor promised, however, that in the future, during his absence from the province, he would have his assent or dissent published in the province within eighteen months after the passage of any laws.<sup>3</sup>

Another effort was made by the Lower House to have an act passed for the relief of the Quakers, but it was again defeated by the opposition of the Proprietor.<sup>4</sup> An attempt of the Lower House to relieve ships built in the province from the payment of port duties was likewise defeated.<sup>5</sup> An

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<sup>1</sup> III. Assem. 152.

<sup>2</sup> III. Assem. 160.

<sup>4</sup> III. Assem. 174, 179, 184.

<sup>3</sup> III. Assem. 175, 178, 181, 182.

<sup>5</sup> III. Assem. 144, 145.



act was passed by which any white woman servant who should intermarry with a negro should become free immediately, and all the issue of such marriage should be free; but the priest or magistrate who performed the marriage was to be fined 10,000 pounds of tobacco. Through the efforts of the Upper House<sup>1</sup> it was added that the master or mistress of the woman should be fined 10,000 pounds of tobacco.<sup>2</sup> This act shows that such marriages were contrived by the masters, who then, by a former act, retained the woman in service during life, as also her issue.

Another important act, extending the powers of the county courts, was passed this session.<sup>3</sup> All cases of larceny not exceeding 1000 pounds of tobacco in amount were to be judged in the county courts by a jury trial if the case was a first or second offense. The punishment to be fourfold the value to the person injured, with whipping or pillorying, or both, as the judges thought fit. The punishments inflicted by the laws of England, and followed in Maryland, were declared to be too severe for the province.

Before the Assembly had been prorogued the Proprietor issued an ordinance concerning elections. It was the ordinance of September 6, 1681, which is often mentioned afterwards.<sup>4</sup> By this ordinance election writs were to be issued from the Court of Chancery to the sheriffs, directing the election of two delegates from each county or chartered city. In case of a vacancy by death, application was to be made to the Secretary to have an election writ issued from the Chancery Court. No sheriff was to be elected. Having settled this matter, the Proprietor next made a "Declaration in relation to his proceedings in defense of the Province," which was nothing but a complaint of the last Assembly and its demand for "imaginary privileges" and a denunciation of its proceedings.<sup>5</sup> He intended perhaps to influence the next session of the Assembly.

The November session accomplished but little. The act of

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<sup>1</sup> III. Assem. 177.

<sup>2</sup> III. Assem. 203.

<sup>3</sup> III. Assem. 201.

<sup>4</sup> Council Book, 1677-1683, 247.

<sup>5</sup> Council Book, 1677-1683, 247.

1676 establishing the perpetual laws had itself been made a temporary law by the reviving act of 1678. The Proprietor, after a struggle with the Lower House, now procured its repeal.<sup>1</sup> This session revived<sup>2</sup> the act against divulgers of false news. The Proprietor declared that in the future he was resolved to publish the proceedings of all Assemblies, for the satisfaction of the people of the province.<sup>3</sup>

Fendall, Coode and Godfrey were now tried.<sup>4</sup> In Fendall's trial it was evident that the judges did all they could to obtain a verdict of guilty, but the jury only found him guilty of speaking several seditious words, without force or practice, and "if the Court thought him guilty of breach of the Act of Assembly, it did; and if not, it did not." Of course the court thought him guilty, and he was fined 40,000 pounds of tobacco and banished forever from the province.

The English law of treason was applied in this case. The accused was not told of what he was accused, the Attorney-General informing Fendall that every man accused is presumed to know what he had done. To the most serious charge made against him, Fendall pointed out that, contrary to both English and Maryland law, there was only one witness.<sup>5</sup>

Coode was acquitted by the jury, but Godfrey was found guilty of trying to take Fendall from prison and was sentenced to be hanged. The sentence was, however, commuted to life imprisonment. Coode was a justice of St. Mary's County Court and Godfrey a justice of Charles County Court. In the Council Proceedings the evidence against Fendall, Coode and Godfrey may be found.<sup>6</sup> God-

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<sup>1</sup> III. Assem. 226, 227, 228, 233, 235, 237, 238, 247.

Fees as usual were considered and limited (III. Assem. 244, 255), but an act relating to the Land Office was rejected by the Proprietor. III. Assem. 234, 240, 243.

<sup>2</sup> III. Assem. 245. <sup>3</sup> III. Assem. 221. <sup>4</sup> III. Assem. 313, 330, 332.

<sup>5</sup> The jury was told by the Chancellor that it was judge of the facts and not of the law.

<sup>6</sup> Council Book, 1677-1683, 208, 209, 210, 211, 212, 218, 219, 220, 221, 222, 226, 262, 263, 278, 284, 292.

frey is seen to have done but little, and the popularity of Fendall and of Coode is manifest.<sup>1</sup> Godfrey was placed in irons.<sup>2</sup> The arrest of Fendall's brother Samuel was ordered, but it cannot be said that he was arrested.<sup>3</sup>

Arrests for seditious speeches continued for some time. A plot was reported by which the Proprietor, the Chancellor and the Secretary were to be killed, but it does not seem to have been attempted.<sup>4</sup> Fendall went to Virginia, and the Proprietor wrote that Fendall was the most likely person there to stir up a rebellion of the discontented party, and if he had caused a rising in Maryland, Virginia would not have remained quiet.<sup>5</sup>

The Proprietor had been accused in England of giving most of the offices to the Catholics. He now sent a list of the officers of the province with a statement of their religion.<sup>6</sup> This was followed by a declaration signed by twenty-five Protestants, nearly all office-holders, that they had observed "his Lordshipp's favours impartially distributed, and Places of Honor, trust and profit conferred on the most qualified for that purpose & service without any respect or regard had to the religion of the participants."<sup>7</sup>

The manner in which these signatures were obtained was as follows. When the Assembly of April, 1682, was ready to dissolve, the Proprietor presented to the members of the Assembly a declaration in vindication of himself and his government. He himself had prepared the paper and he asked those present to sign it. To have refused to do so would have been difficult, embarrassing and dangerous.<sup>8</sup> Signatures were thus obtained. Many of them were of office-holders and really had little weight. As a matter of fact, nearly all the important offices were held by members

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<sup>1</sup> Council Book, 1677-1683, 222, 224, 226, 274, 275, 277.

<sup>2</sup> Council Book, 1677-1683, 293.

<sup>3</sup> Council Book, 1677-1683, 275, 276, 277.

<sup>4</sup> Council Book, 1677-1683, 279, 280, 282, 296, 305, 306, 336, 348.

<sup>5</sup> II. Council, 351.    <sup>6</sup> II. Council, 300, 309.    <sup>7</sup> II. Council, 353.

<sup>8</sup> III. Assem. 314.

of the Proprietor's family, who were for the most part Catholics. In the province the Protestants far outnumbered the Catholics, and if only half of the officers were Catholics, it seemed monstrous to the Protestants at a time when the Popish plots were agitating all England.

Lord Baltimore now began his quarrels with the king's collectors of customs. He charged Rousby, who had called him a traitor, and Babcock with insolence, fraud against the king's customs, and breach of the laws. The collectors, on their side, charged Lord Baltimore with obstructing them in performance of their duties, and urged that he only wished to replace them with Diggs, his wife's son-in-law, or with Philip Calvert, who had married Jane Sewall. Indeed Lord Baltimore did make application on their behalf. Rousby was accused of treason, of lewdness and debauchery. He was said to have left the province contrary to the law regulating departures from the province. This last charge seems abundantly disproved.<sup>1</sup> Babcock died early in the dispute, but Rousby was to die by the hand of a cousin of the Proprietor, and by his death Rousby aided in the overthrow of the Proprietor's government. Through the whole dispute the Proprietor seems to have been in the wrong.\* The impression is left upon us that he wilfully misrepresents facts. At the end of this first stage of the dispute he was fined £2500 by the king.<sup>2</sup>

The Assembly met again in April, 1682. It was mainly concerned in passing several acts placing bounties on the production of hemp and flax and the manufacture of linen and woolen cloths within the province.<sup>3</sup> An act was passed to encourage tillage; corn, wheat, oats, barley, rye, peas, pork, beef and bacon were made legal tender for all debts, except the Proprietor's rents and the public levies.<sup>4</sup> The reason for these laws is found in the disturbance which

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<sup>1</sup> II. Council, 295, 296, 297, 298, 299.

<sup>2</sup> II. Council, 274, 276, 278, 280, 286, 288, 296, 301, 302, 303, 305, 306, 308, 309, 334, 343, 361, 363, 364, 368, 369, 370.

<sup>3</sup> III. Assem. 274, 276, 296, 300, 324, 325.

<sup>4</sup> III. Assem. 321.



arose in Virginia about this time, when a great deal of tobacco was cut. There was popular discontent with the low price, but a cessation in the planting of tobacco was desired neither by the king nor the Governor of Virginia nor the Proprietor, for all of their revenues were increased by increased exports.<sup>1</sup> The Lower House procured the passage of an act relieving ships owned in the province from the port and anchorage duty.<sup>2</sup>

An election was held and a new Assembly met in October, 1682. By the writs issued, only two delegates were elected from each county. The Proprietor declared to the Assembly that this was "according to the Undoubted rights, Privileges, and Powers of my Charter."<sup>3</sup> The Lower House said it had been instructed by the freemen to make provision that they be restored to their former right of electing the accustomed number of delegates from each county, and asked the Proprietor that a bill might be passed directing that all writs for the future should require the election of two, three or four delegates for each county, at the choice of the freemen.<sup>4</sup> This request the Proprietor refused.<sup>5</sup> The Lower House, however, passed such a bill and sent it to the Upper House, which refused to do anything with it until the act establishing towns was passed by the Lower House. As the Lower House would not pass that measure, the bill died.<sup>6</sup> The act for the establishment of towns, called an "act for the advancement of trade," was not passed by the Lower House, though the Upper House repeatedly

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<sup>1</sup> II. Council, 355, 356, 357. The power of the county courts to levy their expenses upon the counties was limited to 1000 lbs. tobacco for the larger, and 600 lbs. tobacco for the smaller counties for each sitting of the county court. III. Assem. 322.

<sup>2</sup> III. Assem. 273, 274, 276, 291, 297, 323.

The desire of the Lower House was to have the act for the killing of wolves made a temporary law, which was the cause of much trouble later. III. Assem. 296, 297, 298. The expenses of the delegates were to be borne by the province, and not by their respective counties. III. Assem. 318.

<sup>3</sup> III. Assem. 334. <sup>4</sup> III. Assem. 345, 407. <sup>5</sup> III. Assem. 416, 455.

<sup>6</sup> III. Assem. 460, 465, 480, 418, 485, 430, 434.

urged its passage.<sup>1</sup> The Lower House voted that its members alone were representatives of the freemen and that the expenses of the Upper House should not be paid by the public levy.<sup>2</sup> The impeachment of Jacob Young, which was not finished, occupied much of the Assembly's time.

In 1683, Henry Darnall, a cousin of the Proprietor, and William Diggs, who had married Elizabeth Sewall, step-daughter of the Proprietor, were commissioned Judges of the Probate Court and Keepers of the Great Seal. Appeals to the Governor were allowed from their decisions.<sup>3</sup> Thus a separate and distinct Probate Court was established. At the same time Nicholas Sewall, the stepson, and John Darnall, a cousin of the Proprietor, were commissioned Secretaries of the Province, dividing this office for the first time.<sup>4</sup>

The Assembly met again in 1683. The Lower House immediately protested against a sheriff sitting as a member, and obtained the election of a new member in his place.<sup>5</sup> The Secretaries had refused to issue the writ for the election upon a warrant signed by the Speaker, and only complied upon receiving an order from the Proprietor. The Lower House now prepared a bill for the election of burgesses similar to the measure presented to the Upper House at the previous session. The Upper House refused to consider the bill, saying the matter had been settled by the Proprietor's ordinance of September 6, 1681.<sup>6</sup> The Lower House, however, insisted on having the bill, which had been sent to the Upper House, acted upon. The latter in turn insisted that the bill establishing towns should be passed

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<sup>1</sup> III. Assem. 350, 352, 358, 372, 379, 385, 410, 412, 419, 422, 424, 426.

<sup>2</sup> III. Assem. 373, 419. The Lower House was also very tenacious of its privileges and refused admission to members of the Upper House wearing their swords. III. Assem. 356, 358, 409, 414, 416. The Proprietor settled the fees of the clerk of the Council, a thing the Lower House wished to do itself, as it had always insisted on doing. III. Assem. 401, 475.

<sup>3</sup> Lib. R. R. 188.

<sup>4</sup> Lib. R. R. 189.

<sup>5</sup> III. Assem. 451, 527, 529, 531.

<sup>6</sup> III. Assem. 452, 530.

by the Lower House. A long struggle ensued. The Upper House passed an election bill that was rejected by the Lower House, which in its turn prepared a new bill. Conferences were held and amendments proposed. The Proprietor insisted upon his prerogatives. The Lower House declared it did not wish to infringe upon them, but only wanted to have the manner of electing burgesses made certain and fixed. At the same time the House claimed that the right of assembly belonged to the freemen, not through any grant in the charter, but as the privilege of free-born Englishmen. The bad faith of the Upper House is apparent in its refusal to pass the bill after promising to do so as soon as the Lower House passed the bill for towns. Thus the election act failed. The Proprietor had conquered in his struggle to reduce the membership of the Lower House. Not until after the overthrow of the Proprietary government was the old number of four delegates from each county restored.<sup>1</sup>

The Proprietor wished above all things the act establishing towns to be passed. To understand the opposition to this act it must be remembered that any man with a waterfront could have a landing of his own and load his tobacco directly from his plantation upon ships. By the act for towns no tobacco could be shipped except at these towns. Storage-houses were to be provided, and town officers of course received fees. To these towns the tobacco due from the tax-payers must be brought. The act was never fully enforced. The Lower House wished to name the places for these towns, but the Proprietor claimed that as his prerogative, and with entire justice, for it was especially mentioned in the charter. The Lower House got the provision attached that no one of these towns should have representatives in the Assembly until it had sufficient inhabitants to pay the expenses of such representation. In the attempt to obtain concessions from the Proprietor, such as the pas-

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<sup>1</sup> III. Assem. 458, 460, 462, 470, 474, 478, 486, 491, 493, 496, 505, 513, 533, 541, 545, 548, 558, 563, 580, 583, 597.

sage of the bills for elections, and for levying war, by holding back this act for towns, the Lower House failed. The Proprietor called the members of the Lower House into the Upper House and made an angry speech, which produced the desired effect. The act for towns passed.<sup>1</sup> As regards legislation for bringing money into the province the Proprietor was not so fortunate. This act was taken up, but, as the Assembly wished the Proprietor's duty of two shillings per hogshead and port duties to be paid in the cheapened money, and gave the Proprietor nothing to offset his loss, the proposed measure was quietly dropped.<sup>2</sup>

The Assembly had met for this session at the Ridge, in Anne Arundel County. This was more convenient than St. Mary's, and the Lower House was much pleased. It tried to have not only the Assembly but the Provincial Court, the Secretaries and other provincial officers permanently established in Anne Arundel County. The Proprietor seemed to assent, on condition that fitting buildings should be erected, to which proposal the Lower House agreed.<sup>3</sup> A gift of 100,000 pounds of tobacco to the Proprietor by the Lower House was refused by him, for he perhaps thought it would make the change binding upon him.<sup>4</sup>

The Upper House sent an act to the Lower for the settling of the two shillings per hogshead duty upon the Proprietor and the heirs of his blood forever. To this the Lower House would not consent, but settled it on Benedict Calvert, the son of the Proprietor, during his life. The Proprietor, however, refused to assent to the act, which seems to have been changed in other respects also.<sup>5</sup> An act

<sup>1</sup> III. Assem. 459, 460, 465, 466, 468, 469, 479, 480, 488, 490, 491, 493, 496, 503, 539, 540, 541, 544, 545, 547, 548, 551, 552, 553, 554, 557, 563, 565, 578, 579, 580.

<sup>2</sup> III. Assem. 448, 474, 532, 544. The Lower House failed to pass an act for levying war. III. Assem. 480, 491, 496, 513, 575, 580, 597.

<sup>3</sup> III. Assem. 483, 495, 505, 506, 517, 587, 590, 594, 600, 602.

<sup>4</sup> III. Assem. 495, 515, 516, 582, 599.

<sup>5</sup> III. Assem. 512, 513, 519, 589, 590, 603. The common fear of the French is seen in a false rumor that twenty Frenchmen had



to "ascertain the validity of laws passed during the absence of the Proprietor" was rejected by the Upper House.<sup>1</sup> George Talbot, a cousin of the Proprietor, was at this time commissioned Surveyor General.<sup>2</sup>

*The Calm before the Storm, 1684-1689.*—The period next to be considered was one of comparative quiet. The Assembly gave way to the wishes of the Proprietor in most matters, but still showed its independence by its presentations of grievances and attempted passage of bills to remedy them. The government of the province, during this period, was in the hands of the members of the Council, who were called Deputy Governors. Nearly every one of them was a relative of the Proprietor. Every office of importance, with one apparent exception, was occupied by one of his relatives. James II. ascended the English throne early in this period, and without doubt his example influenced the Proprietor. The Proprietor's right to exercise the dispensing and suspending powers was openly maintained. Favor towards the Roman Catholic Church was more openly shown than ever before. Attempts to introduce Catholicism into Virginia were made by James II.<sup>3</sup>

In April, 1684, the Assembly met again. The Lower House passed an act for ascertaining the validity of the laws passed in the absence of the Proprietor, as it had done in previous Assemblies. By this act the Proprietor had to

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attacked an inhabitant of the province. III. Assem. 486, 487. An act of the Lower House to prohibit sheriffs or deputy sheriffs from being also deputy surveyors failed. III. Assem. 573.

<sup>1</sup> III. Assem. 508, 509, 510, 512, 589, 590, 594, 595, 596. The session ended with the Proprietor's refusal to confirm the act reviving the temporary laws because it included in the temporary laws the act for killing wolves, which had been made a perpetual act, and the Lower House would not omit it from the reviving act. III. Assem. 519, 520, 603, 604.

<sup>2</sup> Lib. R. R. 192.

Several provisions concerning land were made (Lib. R. R. 1; II. Council, 394), and the alienations of land were to be examined. Lib. R. R. 59.

<sup>3</sup> Burk's Virginia, Vol. II., 299; Cooke's Virginia, 300.

declare his disassent to a law within twenty months after its passage; a later veto had no force. The Upper House wished to extend this period to three years, whereupon the Lower House expressed its astonishment, for in 1681 the period of eighteen months was agreed upon, not only by the Upper House, but by the Proprietor also. The Proprietor settled the matter by declaring that he would not consent to any such an act.<sup>1</sup>

The "act for levying war" the Proprietor refused to consider, declaring he had suspended the law then in force, perhaps for his life; accordingly any new act was useless.<sup>2</sup> The attempts of the Lower House to pass a new "act for the punishment of certain offenses," by which the severe punishments prescribed by the old act were to be mitigated or abolished, were likewise defeated by the Proprietor.<sup>3</sup> A new act for taking the oath of fidelity and a new oath of fidelity were discussed. The Lower House amended the oath by adding the clause "Saving of our Allegiance to his Sacred Majesty," but finally rejected both measures, the other changes being objectionable.<sup>4</sup> The Proprietor declared that the members of the Assembly must take the oath of fidelity at the next meeting of the Assembly.<sup>5</sup> Thus it was the Proprietor, and not President Joseph, who originated the dispute of 1688 concerning the taking of the oath of fidelity.

The perpetual laws were carefully examined by the Assembly, which wished to make some alterations; but the Proprietor announced just what alterations he would consent to, and thus prevented any action.<sup>6</sup> He would not con-

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<sup>1</sup> Lib. F. F. 708, 710; Lower House Journal, 1676-1702, 102, 106, 108.

<sup>2</sup> Lib. F. F. 701; Lower House Journal, 1676-1702, 95, 107.

<sup>3</sup> Lib. F. F. 708, 709; Lower House Journal, 1676-1702, 80, 85, 86, 103, 107.

<sup>4</sup> Lib. F. F. 718; Lower House Journal, 1676-1702, 80, 102.

<sup>5</sup> Lower House Journal, 1676-1702, 116; Lib. F. F. 719.

<sup>6</sup> Lib. F. F. 709; Lower House Journal, 1676-1702, 107.

sent to the re-enactment of the law of 1678, by which the laws of England were to apply when the laws of the province were silent, unless the Governor and Chief Justice should be allowed to decide whether those laws ought to be applied.<sup>1</sup> To this procedure the Lower House would not consent. The Lower House also declared the repealing act of 1678 to be in full force. These things caused the Proprietor to again declare his disassent to all laws passed in 1678.<sup>2</sup> The temporary laws were revived, which was the chief reason for the calling of this session by the Proprietor.<sup>3</sup>

The trial of a certain Carvil at this time for disrespect of the Proprietor is worth noting. Carvil was accused of saying that the Proprietor and his rogues had caused the death of Mrs. Coode; that the Council was composed of mere boys; that the Proprietor had promised the land for Chop-ticotown (which was located on a Proprietary manor); and other similar things.<sup>4</sup> It is well to remember that Mrs. Coode was the daughter of Thomas Gerrard, a former rebel against the Proprietor. If any action of the Proprietary government really hastened Mrs. Coode's death, it is easy to see that it would embitter Coode against that government.<sup>5</sup> Fendall, who had been banished, was reported to be seen, afterwards, in a ship in the Potomac. A search warrant was issued, but he could not be found.<sup>6</sup>

The Proprietor again declared in the Council his disassent to the laws of 1678.<sup>7</sup> He now prepared to go to

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<sup>1</sup> Lib. F. F. 709.      <sup>2</sup> Lower House Journal, 1676-1702, 81, 115.

<sup>3</sup> The act establishing towns was supplemented and an act passed against excessive usury. The Lower House declared that persons obtaining naturalization must in the future pay the Speaker 1200 pounds of tobacco. Lib. F. F. 713; Lower House Journal, 1676-1702, 110. It may be noticed that the Lower House complained that the Secretaries took double fees. Lower House Journal, 1676-1702, 82.

<sup>4</sup> Lib. R. R. 12, 13, 14, 15, 16, 17.

<sup>5</sup> Carvil was tried upon another charge soon after this. Lib. R. R. R. 77, 78, 79.

<sup>6</sup> Lib. R. R. R. 112, 114.

<sup>7</sup> II. Council, 405.

England. Benedict Calvert, his son, was appointed Governor, but as he was too young to govern, Deputy Governors were appointed. These were nine in number, seven of whom were relations of the Proprietor, including indeed the entire Council.<sup>1</sup> Coursey was named Chief Justice and Chancellor; the Council is called a Council of State.<sup>2</sup>

The Proprietor now resolved to establish a Land Office. Henry Darnall, William Diggs, Nicholas Sewall and John Darnall were named a Land Council.<sup>3</sup> As early as 1680 there had been a nominal Land Office, with John Llewellyn in charge as Register,<sup>4</sup> but now the office was definitely established. Complete instructions were given to the Land Council. Henry Darnall and Diggs were to sign all warrants to which the Great Seal was necessary.<sup>5</sup> They were to have one-third the forfeitures of all vessels seized for breach of acts of Parliament,<sup>6</sup> and were to sign all acts of the Assembly as Keepers of the Great Seal.<sup>7</sup> They were appointed keepers of the forest and chief rangers, and empowered to seize all wild cattle and horses and sell them for personal benefit.<sup>8</sup> This Henry Darnall was also made Receiver General for the province.<sup>9</sup> The two Darnalls, Sewall and Diggs, seem to have had most of the powers of the government.<sup>10</sup>

The king's Collector of Customs, Christopher Rousby, was murdered in the autumn of 1684, by George Talbot, the Surveyor General of Maryland, and a cousin of the Proprietor. The murder was committed on board a king's man-of-war, and the captain took Talbot to Virginia to be tried and refused to deliver him to the Proprietary government. How such a trial by his relatives would have resulted is not hard to see, nor can the captain be blamed for refusing to surrender Talbot to be tried by such a court. Tal-

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<sup>1</sup> Lib. R. R. R. 87.    <sup>2</sup> Lib. R. R. R. 90, 91.    <sup>3</sup> Lib. R. R. R. 93.

<sup>4</sup> Kilty's Landholder's Assistant, 108.

<sup>5</sup> Lib. R. R. R. 99; Kilty's Landholder's Assistant, 115, 116.

<sup>6</sup> II. Council, 406; Lib. R. R. R. 101.

<sup>7</sup> Lib. R. R. R. 102.

<sup>8</sup> Lib. R. R. R. 81.

<sup>9</sup> Lib. R. R. R. 103.

<sup>10</sup> Lib. R. R. R. 108.



bot's wife went to Virginia and procured his escape. The Council then issued orders for Talbot's arrest, but the search was not vigorously pushed. Talbot lived for some time, quietly, and unarrested, in his own house. Finally he surrendered and was ordered to be sent to England, but Lord Baltimore procured his pardon from King James.<sup>1</sup> The Council appointed Diggs and Sewall King's Collectors of Customs, but this was bitterly opposed by Nehemiah Blackiston, the other King's Collector of Customs, who complained that they treated him with contempt and defrauded the king's customs. A new collector was soon appointed in Rousby's place and Blackiston was sustained.<sup>2</sup> During all the trouble the Council vigorously supported the prerogatives of the Proprietor, refused to try Talbot in any court held in the king's name, arrested any one who advocated that procedure, and refused to surrender him to the Governor of Virginia. This incident gave a more than seeming basis to charges of resistance to the English government which were made later against the Proprietary.

A new election was held, the writs being issued in the form prescribed by the Proprietor's ordinance of September 6, 1681.<sup>3</sup> When the Assembly met, the Deputy Governors tried to get the members of the Lower House to take the oath of fidelity, as the Proprietor declared should be done, but they refused.<sup>4</sup> Little was done at this session. An act was passed for the advancement of coins, but this act was not to affect the Proprietor's export duty of two shillings per hogshead of tobacco nor his quit-rents.<sup>5</sup> Vincent Lowe, brother-in-law of the Proprietor, had been appointed Sur-

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<sup>1</sup> II. Council, 428, 436, 439, 453; Lib. R. R. R. 138, 142, 163, 177, 180, 181, 185, 187, 189, 197, 199, 201, 202, 214, 221, 222, 232, 239, 253, 255, 271.

<sup>2</sup> II. Council, 436, 520, 526.

<sup>3</sup> Lib. R. R. R. 244.

<sup>4</sup> III. Council, 62.

<sup>5</sup> The act for towns was amended and the temporary laws were revived. Many proclamations were made concerning the towns by the Council during this period, there being great discontent about them. II. Council, 449, 500, 502, 563; Lib. R. R. 207, 245.

veyor General,<sup>1</sup> and Henry Lowe, a nephew of the Proprietor, had been appointed Collector of Customs under Henry Darnall, the Receiver General.<sup>2</sup> William Joseph was appointed in 1688 a Deputy Governor and was to preside in the Council and Provincial Court.<sup>3</sup> The Assembly met again in November, 1688. President Joseph, perhaps by instructions of the Proprietor and certainly in accordance with the Proprietor's declaration of 1684, asked the members of the Assembly to take the oath of fidelity to the Proprietor.<sup>4</sup> The Upper House promptly took the oath, but the Lower House refused, as it had done in 1686.<sup>5</sup> It claimed it was a breach of its privileges and that it had never refused to take an oath such as put to the House of Commons in England, nor would its members take the oath until the Assembly had been prorogued, when they took it as private individuals and not as composing the Lower House.<sup>6</sup>

At President Joseph's request, the Assembly, urged on by the Upper House,<sup>7</sup> passed an "act for a perpetual commemoration and thanksgiving every 10th day of June for the birth of the Prince."<sup>8</sup>

The Lower House presented a list of grievances to the Upper: (1) That the collectors refused to take tobacco for the Proprietor's quit-rents and fines for alienations, as they were required to do by the act of 1671. (2) The Secretaries took fees not due them by law. (4) Laws passed by the Assembly and assented to by the Proprietor were dispensed with, whereas they should only be repealed by the consent of the Assembly. The Lower House asked in this complaint if the Proprietor was going to dispense with a certain law without an act of repeal. In Virginia there was great opposition to the veto power of the Governor.<sup>9</sup> (5) The

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<sup>1</sup> Lib. R. R. R. 283.<sup>2</sup> Lib. R. R. R. 243.<sup>3</sup> III. Council, 41.<sup>4</sup> Lib. F. F. 551.<sup>5</sup> III. Council, 62.<sup>6</sup> Lib. F. F. 557. McMahon is wrong in saying that the oath was taken at the end of the session. McMahon's *Maryland*, 234.<sup>7</sup> Lib. F. F. 574. <sup>8</sup> Lib. F. F. 550, 574. <sup>9</sup> Campbell's *Virginia*, 339.

Attorney General issued writs to the sheriffs by which persons were brought to the Provincial Court not knowing of what they were accused. (6) Press-Masters used their powers in time of peace.

The Upper House answered these grievances as follows: (1) The collectors should in the future take tobacco for the rents and fines for alienations. (2) An act should be passed explaining the law. (4) The Proprietor would only dispense with this clause for the present. (5) The cause of arrest should be known. (6) The government did not encourage such exercise of the powers of the Press-Masters. The Proprietor's dispensing power was upheld.<sup>1</sup> The Lower House passed an act regulating the Secretaries' fees, but Diggs and Sewall, the Secretaries, went to the Lower House and asked that the matter be dropped. They said that in the future they would not charge for the recording of proceedings until the following Assembly.<sup>2</sup> The Lower House asserted its rights in election affairs and asked that writs and returns be presented to it.<sup>3</sup> Among the members of the Lower House were Coode and Hawkins. The Upper House tried to keep them out of their seats, but was forced by the Lower to allow them the privilege.<sup>4</sup> It is not clear whether Clark, another elected member of the Lower House, was allowed by the Upper House to take his seat. Cheseldine was the Speaker.<sup>5</sup>

*The Revolution of 1689.*—Family interests had become too prominent. Nicholas Sewall, Henry Darnall, Vincent Lowe and Henry Lowe, all relatives of the Proprietor, were provided with offices and were Deputy Governors. Elizabeth Sewall first married Dr. Jesse Wharton, and after his death she married William Diggs, who accordingly was made a

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<sup>1</sup> Lib. F. F. 564, 588.

<sup>2</sup> Lib. F. F. 593.

<sup>3</sup> Lib. F. F. 551, 553, 557, 559.

<sup>4</sup> Lib. F. F. 559.

<sup>5</sup> The Upper House desired to make money the standard and measure of all trade, and resolved on a per diem payment for its members. Lib. F. F. 564, 571. The Assembly supplemented the act establishing towns.

Deputy Governor. Anne Sewall's second husband was Colonel Edward Pye, who, like her first husband Rozer, became a member of the Council and a Deputy Governor. Mary Sewall's second husband was a Virginian, and so did not hold office like her first. Jane Sewall had married Philip Calvert, who was now dead. Others who held office, through their family connections with the Proprietor or others, were Henry Brent, who was Examiner General,<sup>1</sup> by his marriage with Anne Calvert, the widow of Baker Brooke; Richard Smith, who had married a sister of Baker Brooke; Clement Hill, who had married the niece of Hatton, widow of Luke Gardiner, both of whom were much liked by the Proprietor; and Peter Sayers, whose wife was the sister of Richard Smith's wife. It is likely that most of the public offices were held by reason of family ties, but these cases are all the writer has knowledge of at present. The list includes all the larger offices, except that of Chancellor, to which Joseph was appointed on account of his knowledge of law.

On the other hand it should be noticed that Coode had married Susanna Gerrard, daughter of Thomas Gerrard,<sup>2</sup> and that Nehemiah Blackiston had married Elisabeth, another daughter of Gerrard.<sup>3</sup> Gerrard Slye, another relative (Coode's stepson indeed), was their agent in England. The struggle that was soon to occur is, in a certain sense, a family struggle.

Rumors of the invasion of England by William of Orange reached Maryland early in the year. The Council immediately ordered all the public arms to be prepared. A letter to the Proprietor required these arms to be distributed into "such hands as shall faithfully serve the King your Lordsp and the Country."<sup>4</sup> In the same letter Lord Baltimore was

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<sup>1</sup> II. Council, 542.

<sup>2</sup> Chancery Lib. P. L., Fol. 755, 1093.

<sup>3</sup> Land Records, Lib. 3, Fol. 24.

It is interesting also to note that Henry Jowles and Kenelm Cheseldine were related.

<sup>4</sup> III. Council, 56, 65.



congratulated on having raised a troop of horse for King James. There can be but little doubt that there was a large party in Maryland favorable to William of Orange. The express declaration of the Council above-made shows that arms were not to be intrusted to members of this party. The English revolution of 1688 is sometimes thought to have been accomplished at one blow, but this is a mistake. Ireland was not conquered by William until 1691. Richard Talbot, Duke of Tyrconnel, who held the government of Ireland in 1688, held out for James II. In Scotland there was a long struggle made by James's adherents. Nor did the Tories in England remain quiet. Risings were repeatedly planned, but they came to grief. James, who fled to France, obtained aid from Louis XIV. and landed with French troops in Ireland in May, 1689.

That France, then the most powerful country in the world and the champion of Catholicism, would attack the English colonies by way of Canada was not only probable but it actually happened. Nor could it be supposed that the adherents of James in the colonies would offer much resistance to their allies the French. Lord Baltimore was an Irish lord and a Catholic. He was, moreover, related to the Talbots, and was intimate with the Tyrconnel Talbots.<sup>1</sup> It was but a few years previous to this that the Edict of Nantes had been revoked by Louis XIV. and the terrible dragonnades instituted. These facts were fresh in the minds of the colonists. In Maryland things had begun to approach a crisis. A treaty with the Indians had been renewed,<sup>2</sup> and this, in connection with the preparations for defense, began to excite suspicion. Rumors became rife of a plot between the Catholics and Indians to destroy the Protestants. It was said that large numbers of Indians had been actually seen attacking parts of the province. The public mind became highly excited. Arrests of divulgers of false news were frequent. These rumors were shown to be false by

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<sup>1</sup> III. Council, 20, 22.

<sup>2</sup> McMahon, 236.

men who soon afterwards joined the movement against the Proprietor. Nor were these rumors confined to Maryland. In Virginia it was said that the Papists had allied themselves with the Indians to massacre the Protestants. Massacres were reported, and John Waugh, a minister of the Established Church, spread these reports over Stafford County, which was very much excited. Many armed bands were formed.<sup>1</sup>

In April, 1689, was formed "An Association in arms for the defense of the Protestant Religion, and for Asserting the Right of King William and Queen Mary to the Province of Maryland and all the English dominions."<sup>2</sup> John Coode, son-in-law of Thomas Gerrard, was the head.<sup>3</sup> As time went on and the colonists learned of the state of affairs in England and saw the unwillingness of the Council to proclaim William and Mary,<sup>4</sup> men who had hitherto supported the government joined the Association. The old rumors of threatened invasion of French and Indians in league with the Catholics were renewed.<sup>5</sup> The Association, with scarcely any resistance, overthrew the Proprietary government, August 1, 1689. The Council was able to raise but few troops, and these, the officers excepted, were not willing to fight. On July 25, 1689, the Association issued a declaration, stating the reasons for its armed uprising.<sup>6</sup> It has been said that these complaints had never been made before, but in the light of our review of the history of the province it is seen that the charges are abundantly justified.

The complaints were as follows: That in 1676, although

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<sup>1</sup> Campbell's Virginia, 341; Burk's Virginia, 304.

<sup>2</sup> Chalmers' Political Annals, 373.

<sup>3</sup> McMahon erroneously states that Coode had been convicted of treason and pardoned by the Proprietor. He was acquitted by the jury in his trial, as has been seen.

<sup>4</sup> Is it not a little doubtful that Lord Baltimore really wished the proclamation made?

<sup>5</sup> The French and Indians did begin to attack the English colonies this year.

<sup>6</sup> III. Council, 101.

four delegates from each county were elected to the Assembly, as had been the custom, only two were summoned to the Assembly by the Proprietor. All four were summoned to the Assembly of 1678, when many good laws were made; but the Proprietor pronounced many of these null and void, though they had been assented to in his name by the Governor and he himself had been governed by them. For the election of delegates to the next Assembly the writs issued directed the election of only two from each county, contrary to the act of Assembly for election of delegates. The most important law passed in that Assembly was dispensed with by the Proprietor, with the exception of the duty of three pence per hogshead imposed by it. The courts accordingly interpreted the laws to suit the pleasures and desires of the Proprietor. All laws might be dispensed with or suspended, thus placing the liberties and property of the inhabitants at the arbitrary disposition of the Proprietor. It must be admitted that these grievances were real and had often been complained of before. The exercise of the dispensing and suspending power by the King of England was declared illegal by the English Bill of Rights of this same year, as was also the interference with elections.<sup>1</sup> The imposition of excessive fees, and contrary to law, was another complaint, and for this there was no redress, since the judges were the very officers who exacted the fees. It has been noticed that the Provincial Court was composed of all the chief officials.

Other grievances were:

The imposition of illegal fees, contrary to the charter, which provided that no taxes should be levied without the consent of the freemen.

The imposition of the like fees upon vessels owned in the province, contrary to an act of Assembly.

The seizure of Protestants by armed forces of Papists without warrant or cause of commitment. Of this nothing

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<sup>1</sup> Taswell-Langmead's *English Constitutional History*, 682.

is further known, but perhaps it refers to certain alleged divulgers of false news and the writs issued by the Attorney General.

The frequent pressing of men, houses, boats, provisions and other necessities by press-masters in time of peace. This complaint was made, as were others, in the Assembly of 1688.

The perpetration of not only private but public murders of Protestants by Papists, crimes connived at and tolerated by the chief authority. This charge refers, perhaps, to the murder of Rousby by Talbot, for it is mentioned in a later charge.<sup>1</sup>

The bad treatment given to the King's Collectors of Customs, as in the case of Rousby and Babcock, was mentioned to show how little regard was paid to the English Government.

Any one upholding the sovereign power of the Crown was looked upon as a traitor and incurred the ill-will of the government. This charge was undoubtedly true.<sup>2</sup> Allegiance to the Crown was little thought of, but allegiance to the Proprietor was everything. The *Jus regale* was constantly exercised by the Proprietor and was severely felt.

Churches and chapels, which, by the charter, should be consecrated to the Church of England, were devoted to the use of the Roman Catholic Church. President Joseph and the councillors were Catholics. It was charged that the Catholics were trying to get possession of children in order to proselyte them.<sup>3</sup> Henry Coursey, years before, had accused Charles Calvert of trying to proselyte a boy.<sup>4</sup>

The declaration stated that the Deputy Governors not only prevented the proclamation of William and Mary, but prayers were said for the success of the Popish forces in Ireland and for the French designs against England, while the right of their Majesties to the crown of England was pub-

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<sup>1</sup> III. Council, 218.

<sup>2</sup> Lib. R. R. R. 147.

<sup>3</sup> Lib. F. F. 592; III. Council, 32.

<sup>4</sup> I Calvert Papers, 383.



licly disowned. This charge was, in all probability, well grounded. The same things were done in England at this very time by many persons not Catholics.

The declaration then stated the danger impending over the province from the French and Indians, who were in league with the Papists. This danger seemed very real to men in those times.

The whole declaration was sent to the King. It can hardly be doubted that many grievances were not expressed at all. The hopes of the lower classes were most likely to have been aroused by the leaders of the movement, but, if so, found no sympathy or fulfillment afterward. The things complained of in the declaration were nearly all remedied. These charges were subsequently amplified<sup>1</sup> and repeated:

“Appointing none but Irish Papists and his owne relations for the most part to have the Chiefe Governing authority.”

Encouraging the Roman Catholics. The priests claimed ecclesiastic liberties and privileges of the Church of Rome by act of the first Assembly.

Non-provision of support for a Protestant clergy.

Violating the freedom of elections.

Prevention of the sitting of elected delegates by summoning only a select number.

Making laws without consent of the Assembly, and extending them to the estates of the inhabitants.

Assuming a power to assent or disassent when, and to what laws he pleased, that are made in his absence from the province.

Assuming a power to repeal laws by proclamation.

Assuming a power to dispense with laws made that had received his own personal assent.

Assuming the “royall stile dignity authority and prerogative.”

Allowing the Attorney General upon his own authority to

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<sup>1</sup> III. Council, 215, 217, 219.

issue writs to the sheriffs for the arrest of certain persons, who were left in ignorance of what they were charged.

Allowing the exaction of illegal fees from masters of ships.

Allowing the exaction of an illegal export duty of three pence per hogshead of tobacco.

Allowing the Secretaries to take illegal fees.

Allowing press-masters to exercise their powers in time of peace.

Assuming to be judges of matters of fact.

Imposing upon the Lower House of Assembly in 1688, against their privileges, the oath of fidelity to the Proprietor, in which there was no reservation of allegiance.

Deputy Governors were accused of allowing the Receiver-General to exact money for quit-rents and alienation fines contrary to law.

Other well-grounded complaints against the Proprietary and his deputies were as follows:

The erection of new offices and officers, with unreasonable and excessive fees, without act of Assembly; for example, the Examiner General and Attorney General for the province and those for the counties, and the Clerk of the Council. The regulation of fees was a right always claimed by the Assembly.

The granting and giving away of lands as escheats before they were found to be such by inquisition.

The disposing and arbitrary selling, for money or otherwise, of places and offices of trust to persons incapable of managing the same, whereby offices are unduly managed and illegal and excessive fees extorted. That such charges were literally true is seen in a sale of the Deputy Surveyorship of Calvert county for 500 pounds of tobacco,<sup>1</sup> and in the admitted incompetence of certain appointees for sheriff.<sup>2</sup>

Nor can there be dispute as to the justice of the following complaints, which are the last we shall consider:

That all the Judges at Common Law, Chancery, Probate

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<sup>1</sup> Lib. R. R. R. 237.

<sup>2</sup> II. Council, 566; III. Council, 16.

of Wills, and of the Upper House of Assembly, erected by Lord Baltimore, were one and the self-same persons and nearly allied. Little justice, therefore, was to be expected when any of them are sued, and as little redress upon any just appeal from them in one capacity to the same persons in another capacity.

And for the same reason the penal laws made against officers for extorting unjust and illegal fees can take little or no effect, for the said persons actually possessed themselves, or by their deputies, of all offices of profit within the province and they themselves were the judges therein.

That many of these grievances really existed has already been shown. That in the very year when liberty made such a great advance in England, the free-born Englishmen of Maryland should attempt to redress their own grievances is not passing strange. To attribute this revolution in Maryland to opposition to Catholicism or to the ambition and revenge of Coode and a few others is to attribute it to insufficient causes, although they doubtless were factors in the movement.

After the Association had taken all power into its hands, many addresses were made to the King by the inhabitants. It can be easily ascertained by examining the commissions issued in 1688 that a large part of the signatures to the addresses made on behalf of the Proprietor were those of office-holders under the Proprietor who had now lost their offices. The addresses on behalf of the Association had many more signatures. One of Coode's answers mentions the rebellion of 1676 and other disturbances to show that continual peace and concord had not existed previous to 1689.<sup>1</sup>

The statements that are generally used to condemn the Association are those of Henry Darnall, Taney, Charles Carroll, Peter Sayer and Richard Smith. Henry Darnall was a cousin of the Proprietor, and his religion and position in the government have already been seen. Taney had

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<sup>1</sup> III. Council, 225.

been sheriff of Calvert County since 1685. Charles Carroll was a Catholic. He had only arrived in Maryland in 1688, and had been appointed Attorney General at a salary of 12,000 pounds of tobacco. Peter Sayer had been sheriff of Talbot County. He was related to Richard Smith, and was a strong adherent of James II. for years after this time.<sup>1</sup> Richard Smith was another beneficiary of the Proprietary government and a relative of the Calverts.

The leaders of the Association have been abused as rogues and law-breakers, but they were really patriots. Nearly all had been county justices. Cheseldine had been Speaker of the Lower House of Assembly. Jowles had held a high military command. Blackiston was King's Collector of Customs. Warren, Beal and Addison were all men of some note. Indeed, even Coode, who had been justice of St. Mary's and delegate to the Assembly, can scarcely have been such an abandoned wretch as he has been described. The charge of irreligion is about the only one made against him that will bear examination. That he incurred the dislike of Nicholson, a man universally hated, is not at all strange. Many of these very men sat in the Assembly for years after this time. They held office both before and after 1689. They cannot have been a set of rascals and profligates.

The actual causes of the revolution in 1689 have now been for the first time shown. Their existence during a long period anterior to the revolution has been demonstrated, together with their growth, the previous disturbances caused by them, and their resistless force when the favorable moment came for the people to overthrow the Proprietary government.

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<sup>1</sup> III. Council, 560, 562.



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# INDEX TO THE FOURTEENTH VOLUME

OF

## JOHNS HOPKINS UNIVERSITY STUDIES

IN

### HISTORICAL AND POLITICAL SCIENCE.

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#### A

Abatement, of taxes, 389.  
 Abolition societies, 433-435, 434 note.  
 Amendments, in Hawaii, 15, 32; in Virginia, 273, 279 note.  
 Andros, taxation under, 348 note, 360, 369 note, 371, 378, 386, 388, 391-397; right to tax, 376, 377 note.  
 Annexation, of Hawaii, 29-31, 33, 38; in Baltimore, 49, 63, 73.  
 Anti-slavery sentiment, in North Carolina, 187, 219-223; in New Jersey, 428-440, 468.  
 Appeal, to king, 498, 542-543.  
 Appeal Tax Court, 70, 81, 523, 545.  
 Appointment, power of, 59, 63, 87-89.  
 Apportionments, in Virginia, 1619-1776, 268-271; 1776, 272-273; 1816, 280; 1830, 294-297; 1852, 322-324; 1869, 330-332; 1871, 334; 1878, 335; 1891, 336.  
 Apprenticeship, in New Jersey, 440-441.  
 Assemblage, of slaves, in North Carolina, 207-208, 218; in New Jersey, 446.  
 Assembly, assent to money-bills, 491, 521, 573; packed, 520-521, 524, 531, 540.

Association, of Protestants, 572-578.

#### B

Bacon's Rebellion, 478, 534-539, 543, 551.  
 Balance of powers. *See* Separation of functions.  
 Baltimore, city government of, 45-91; establishment, 47-49; 1730-1797, 49-57; 1797-1833, 58-66; 1833-1867, 66-69; 1867-1894, 70-73; present organization, 73-84; defects, 84-91.  
 Baltimore, trade with the West, 299 note, 300 and note, 317; representation of, 337.  
 Bassett, Dr. J. S., on "Slavery and Servitude in the Colony of North Carolina," 171-254.  
 Bicameral system, in New England, 110, 129, 138, 157 and note, 159, 162, 164; in Virginia, 268, 272; in Maryland, 484-485, 494, 504-505, 513. *See* Joint ballot.  
 Bill of Rights, Hawaiian, 12, 17, 21, 34.  
 Bills of credit, in Connecticut, 381-383 and note; in Massachusetts and Rhode Island, 382 and note.

Board, of Health, 64, 66 note, 83; Water, 67, 82; of Supervisors of Elections, 69, 71, 77-78; Harbor, 82. *See* Commissioners.

Borough representation, 268-269, 272.

Bounties, 558.

Brooke, Baker, 524, 526, 536.

## C

Cabinet, in Hawaii, 9, 11, 18, 26, 32, 35-36.

Castration, in North Carolina, 199-200.

Catholic plots, 477-479, 549-550, 558, 571-575.

Catholics, in Maryland, 522, 524, 534, 540, 543, 557, 563, 577; officeholders, 557-558, 575, 578.

Certificate, slave's, in North Carolina, 201, 205; in New Jersey, 442 note, 443.

Chambers, H. E., on the "Constitutional History of Hawaii," 3-40.

Chandler, J. A. C., on "Representation in Virginia," 257-337.

Christianity, slaves and, 213-216.

Church establishment, in Connecticut, 398-402 and note; in Maryland, 494, 515, 544-545, 574-575.

City Council, 59-60, 62-63, 67, 73-74.

City government, 45-91. *See* Baltimore.

Civil service, 89-91.

Code of Laws, 352-354, 359-361, 363, 366-368, 371-372, 385, 399-400, 403, 406-407.

Coinage, in Maryland, 507-508.

College representation, 271-272 and note.

Commissioners, of Baltimore Town, 49-51; Special, 52-54; City, 61, 63, 66 note, 80-81; of the Watch, 61; of Health, 61, 63, 66 note; of Finance, 64, 72, 83-84; School, 64, 78-80; Police, 68-70, 75-77; Fire,

68, 82; Park, 69, 72, 84; Liquor License, 78; for Opening Streets, 80; of Street Cleaning, 81; the system, 84-87. *See* Board.

Commodity payments, 492.

Compensation, for slaves, 199-200, 449-450.

Connecticut, Council of, 120-131, 365, 366 and note. *See* Council.

Connecticut, taxation in, 343-409. *See* Taxation.

Constable, in Connecticut, 368, 372, 384-389, 384 note. 385 note, 408.

Convention, attempts for, 275-285, 302-313; Richmond, 284-298; Reform, 314-324; Underwood, 328-332.

Coode, John, 550-551, 553, 556, 565, 572.

Cooley, H. S., on "A Study of Slavery in New Jersey," 413-470.

Corruption, in Hawaii, 23-24, 27.

Council, in Massachusetts, 101-119; in Connecticut, 120-131, 365-366 and note; in New Hampshire, 132-145; in Rhode Island, 146-160; in Maryland, 481, 484-485, 499, 504-505, 563, 576-577.

Council, origin of, 101-103, 120, 132, 146-148, 146 note, 162; choice, 104, 106, 116, 118 and note, 120-121, 133, 141, 145, 149, 163; limitation of numbers, 104 and note, 121, 122 note, 133 note, 149-150 and note, 164. *See* Executive, Judicial, and Legislative function.

Council of Chiefs, in Hawaii, 9, 11.

Counties, in Virginia, 269-277, 283-285 and note, 330-335; in Connecticut, 408; in Maryland, 485, 490-491.

Cumulative vote, in Hawaii, 37.

Currency, in Connecticut, 378 note, 381-383; in Maryland, 493, 507-508, 513, 521-522, 558, 567.



## D

- Davis' Rebellion, 534-545, 551.  
 Debt, of Baltimore, 63-65, 67, 70-72.  
 Denization, in Hawaii, 35; in Maryland, 507.  
 Discount, on taxes, 389-390.  
 Disqualification, of councillors, 126-127, 143, 154, 162.  
 Distress, in Connecticut, 387 and note, 388 note, 407-408.  
 Doddridge, Philip, 279, 285, 293 note, 294 note, 295 note.  
 Dole, Sanford B., 29, 38.

## E

- Education, public, in Baltimore, 64, 78-80; in North Carolina, 227; in Connecticut, 402-405, 403 note; in New Jersey, 461.  
 Election, of Delegates, 481, 485, 502, 507, 510, 542, 545-547, 550-555, 559-562, 567, 569, 573, 575.  
 Electoral system, 53, 59-60, 62, 66.  
 Emancipation, in North Carolina, 221-222, 233-234; in New Jersey, 427, 432, 455-460.  
 Escheats, 490, 497, 519, 526, 576.  
 Executive function, of Council, 103-107, 123-124, 133-134, 142, 151-152, 164-165, 484, 563; governor as member, 104, 113-114, 116, 122-131, 133-134, 151, 158 note, 160, 163 note, 484; establishment of courts, 106 and note, 118, 134 and note, 152; and the militia, 106-117-118, 151.  
 Exemption, from taxation, 354 note, 360 note, 362 note, 363 note, 380-381, 380 note.  
 Export duties, in Connecticut, 394; in Maryland, 491, 501-503, 508, 518, 520-521, 531, 539-542, 545, 562-567, 573, 576.

## F

- Farming out taxes, 394 and note.  
 Federal numbers, 284, 285 note, 290-295.

- Fendall, 500-506, 525, 543, 546, 549-551, 556-557, 565.  
 Fidelity, oath of, 499, 531, 534, 541, 543, 564, 567-568, 576.  
 Finance, in Baltimore, 64, 72-75, 83-84.  
 Fire regulations, 50 note, 68, 82.  
 Forfeiture, 370 note, 371 note, 372 note, 374.  
 Fourfolding, in Connecticut, 474 and note.  
 Free negroes, in New Jersey, 443-444, 462-465; travel, 443; presumption of slavery, 444, 462; privileges, 462-465.  
 Free negroes, in North Carolina, 233-239; emancipation, 233-234; privileges, 235-236; duties, 236-238; suit for freedom, 238-239.  
 Free speech, 507, 510.  
 Fundamental Constitutions, 185, 195, 247.  
 Fundamental Laws, 420.  
 Fundamental Orders, 121, 123, 128 and note, 349-350, 366 note.

## G

- Gas, in Baltimore, 63.  
 Gerrald, 501, 525, 543.  
 Gerrymanders, 328, 331, 334, 336.  
 Governor, member of Council, 104, 113 and note, 114 note, 116, 122-131, 133-134, 151, 158 note, 160, 163 note, 484; veto of, 113 note, 129, 131, 138 and note, 140, 156, 158 note, 160, 482, 484.  
 Grand List, 347, 356, 359, 364, 367-374, 378-379, 409.  
 Grievances, of Maryland, 501, 507, 513-518, 526, 534-543, 546-547, 551-553, 563, 568-569, 572-577.

## H

- Hawaii, constitutional history of, 5-40; early history, 7-11; constitution of 1840, 11-15; organic acts of 1845, 16; constitution of 1852, 17-20; of 1864, 20-22; revolution of 1887,

22-25; constitution of 1887, 25-27; of 1893, 27-33; of Liliuokaulani, 31-32; of 1894, 34-38; bibliography, 39-40. *See* Contents, 5-6.

Health, public, 61, 63, 66 note, 83.

House of Lords, 161-163.

House of Nobles, 13, 15, 18-19, 21, 26, 32, 36.

House of Representatives, Hawaiian, 13, 15, 19, 21, 26, 36.

Hundreds, in Maryland, 485-490, 493.

## I

Impeachments, 116, 119, 145, 160, 163 note.

Import duties, 394.

Indian slaves, in North Carolina, 239-242; in New Jersey, 421-423.

Indian title, 488.

Internal improvements, 65-66, 287-291, 299-301, 305, 317-319.

## J

Jefferson, 274-275, 280-281, 285, 318 note.

Joint ballot, 113 note, 129, 159.

Jones, F. R., on the "History of Taxation in Connecticut," 341-409.

Judicial function, of Council, 108-109, 122, 125-127, 135-138, 141-143, 153-155, 164-165, 485, 487, 540, 576-577; power delegated, 109, 125-127, 137, 154, 165; councillors disqualified, 126-127, 143, 154-155 and note, 162; impeachments, 116, 119, 145, 160, 163 note.

Judicial reforms, 309 note, 310, 314 note.

Judiciary, in Hawaii, 14-16, 19, 22, 27, 32, 37; in Maryland, 487-488.

## K

Kalakaua, 22-27.

Kamehameha I, 9-10.

King, in Hawaii, 14, 17-18, 25, 32.

## L

Land grants, 488-490, 507, 511-512, 519, 524, 566.

Legal tender, in Connecticut, 383 note; in Maryland, 493, 518, 558.

Legislative function, of Council, 110-115, 122, 128-131, 138-145, 150, 156-165, 484-487, 504-505, 540; money-bills, 107 and note, 110-119, 129, 139-145, 157-159, 163 note, 167; negative voice, 112-113, 119, 121, 128-129, 144, 157-158, 162, 164; bicameral system, 113, 129, 138, 157-159, 162-164; joint ballot, 113 note, 129, 159; veto of governor, 113 note, 129, 131, 138 and note, 140, 156, 158 note, 160.

Legislature, Hawaiian, 14, 18, 21, 26, 32, 34.

Licenses, in Baltimore, 78; in Connecticut, 391-394; in Maryland, 493.

Lighting, street, 54, 63.

Liliuokaulani, 27-29, 31.

Limitations, statute of, 511.

Listing, at base, 347, 362 and note, 378, 380 and note, 406.

Lord Proprietor, of Maryland, 481-483, 486, 497-499, 547; veto, 481, 483, 486, 516, 527, 540, 554, 564, 568-569, 573, 575; initiative, 481, 486, 498; dispensing power, 569, 573, 575.

Lord Proprietors, of North Carolina, 185, 210; of New Jersey, 419-420.

Lottery, 27, 34.

## M

Madison, 275, 286, 290-296.

Manors, in Maryland, 489.

Manumission, in North Carolina, 221-222, 233-234; in New Jersey, 427, 432, 455-460.

Marshall, C. J., 286, 291, 293 note.

Maryland, revolution of 1689, 475-579; usual explanation, 477-479; government in 1658, 480-499; proprietor, 481-482;

- governor, 482-484; council, 484-485; assembly, 485-487; judiciary, 487-488; land, 488-491; taxes, 491-493; currency, 493; militia, 493-494; religion, 494; secretary, 494-495; other officials, 495-496; a Palatinate, 497-499; history, 1658-1689, 500-578; Fendall's rebellion, 501-505, 509; resistance, 505-520; submission, 520-534; Davis' rebellion, 534-545; struggle, 545-563; calm, 563-569; revolution of 1689, 569-578; bibliography, 579. *See* Contents, 475.
- Massachusetts, Council of, 101-119.
- Massachusetts, influence on Connecticut, 347-349, 348 note, 358-359, 361, 367 and note, 365, 380, 382 note, 403.
- Mayor, 59-60, 63, 66, 70, 73-74.
- Militia, in Maryland, 493-494, 547-548, 553.
- Ministerial responsibility, 16-17, 25, 26, 32.
- Missionaries, in Hawaii, 10-12.
- Mixed basis, 278, 284, 287-292, 303 note, 306, 310-317, 320 note, 322.
- Money, in Connecticut, 378 note, 381-383, 382 note; in Maryland, 493, 507-508, 513, 521-522, 558, 567.
- Money bills, in Massachusetts, 107 and note, 110 and note, 114, 116, 118-119, 167, 375; in Connecticut, 129, 375-376 and note; in New Hampshire, 139, 142-143, 145; in Rhode Island, 157-158, 157 note, 163 note; in Maryland, 491, 521, 573.
- Mortmain, 489, 494.
- N
- Naturalization, in Hawaii, 37-38; in Maryland, 512, 522, 565 note.
- Negative voice, 112 and note, 113 note, 119, 121, 128-129, 144, 157-158, 162, 164.
- Negro domination, 328-333, 328 note, 333 notes.
- Nepotism, 482, 509-510, 516-519, 524, 526, 529-530, 534-535, 540, 558, 560, 563, 566-570, 575-578.
- New Hampshire, Council of, 132-145.
- New Haven, taxation in. *See* Taxation.
- New Jersey, slavery in, 415-470; Lords Proprietors, 419-420. *See* Slavery.
- New Plymouth, Council of, 115 note.
- North Carolina, slavery in, 173-254; Lords Proprietors, 185; Concessions of 1665, 185; Fundamental Constitutions, 185; immigration into, 185-187; anti-slavery sentiment in, 187; white labor, 192-193. *See* Slavery.
- Notley, Gov. Thos., 512-513, 523, 526, 529, 536, 540, 547.
- O
- Opium, in Hawaii, 24, 27.
- Outlawry, 200, 204, 210-211.
- P
- Palatinate, 478-481, 497-499.
- Parish, in Connecticut, 398.
- Parish representation, 269-270, 272.
- Park tax, 72, 84.
- Patrole, of slaves, 206, 229.
- Payment in kind, in Connecticut, 378 and note, 382 and note; in Maryland, 492.
- Pillory, 198, 209.
- Plantations, representation by, 268-269, 272.
- Police system, 54, 61, 68.
- Poll tax, in Connecticut, 361-363, 361 note; in Maryland, 492, 508, 511, 518, 528-529, 534, 538-539.
- Poor relief, 405, 464-465, 490, 492.
- Popular initiative, 149 note.
- Population basis, 271, 292 and note, 330-332, 336-337.
- Ports of entry, 396 note, 481, 483, 497, 515, 561.

Premier, of Hawaii, 10, 13-14, 18, 21.  
 President, of Hawaii, 35.  
 Privileges, of Assembly, 507, 510, 551, 553.  
 Privy Council, in Hawaii, 16, 18, 22, 26, 32.  
 Property qualification, 59-62, 73-74, 520, 538, 546-547.  
 Property tax, in Virginia, 291 note, 306, 317 note; in Connecticut, 358-360; in Maryland, 492.  
 Provincial Court, 485, 487-488, 524, 540.  
 Puritans, in Maryland, 480, 492, 500-506, 572-578.

## Q

Quakers, and slavery, in North Carolina, 219-223; in New Jersey, 425 note, 428, 430-432, 441, 468.  
 Quakers, and the oath, 500-501, 511, 527, 548, 554.  
*Quia Emptores*, 481, 489.  
 Quit-rents, 489, 492, 519, 542, 567, 576.

## R

Recognition, of Hawaii, 15-16, 29.  
 Representation, in Virginia, 259-337. *See* Virginia.  
 Revolution, of 1688, 470-474, 477.  
 Rhode Island, Council of, 146-160.  
 Riley, F. L., on the "Colonial Origins of New England Senates," 95-168.  
 Roads, 514 and note, 528.  
 Royal African Company, 191, 244, 420, 423.  
 Royal veto, 15, 17, 25, 32.

## S

School system, 64, 78-80.  
 Sectional jealousy, 277-296, 301-304.

Senate, in Hawaii, 36. *See* House of Nobles.  
 Senates, New England, 97-168, 375-376; origin of, 99, 116-117, 130, 143-145, 148, 158; and the Executive Council, 117-118; and the House of Lords, 161-163; developing forces, 164-167; common characteristics, 167-168. *See* Council, and Contents, 97-98.  
 Senatorial districts, 280, 285.  
 Separation of functions, in Hawaii, 17, 21, 26; in Massachusetts, 117; in Connecticut, 130; in New Hampshire, 143-144 and note; in Rhode Island, 154, 158; theory of, 162, 165-166 and note.  
 Servitude, white, 243-254.  
 Settlements, representation by, 268.  
 Sheriff, in Maryland, 495-496, 499, 508, 511, 513, 546, 548, 560.  
 Slavery, and representation, 280 note, 281 note, 288-289, 298, 305 note, 317-318, 323 note, 325, 329.  
 Slavery, in Maryland, 512, 555.  
 Slavery, in New Jersey, 415-470; Indian slavery, 421-423; slave trade, 424-432; anti-slavery sentiment, 428-440; numbers, 440-441 and notes; abolition, 436-439; fugitives, 442-445; larceny, 445-446; hunting, 446; assembly, 446; travel, 447; punishment, 447; procedure, 447-452; testimony, 449, 462; plots, 452-454; manumission, 455-460; maintenance, 460-461; education, 461; color presumption, 462; enlistment, 463; condition of slaves, 465-468; bibliography, 469-470. *See* Contents, 415.  
 Slavery, in North Carolina, 173-254; economic causes of, 179-182; obstacles to, 182-183; spread of, 184-187; estimate of numbers, 187-190, 193-194; importation, 190-192; distribution, 192-194; laws



- concerning, 195-212; trial, 196-197; testimony, 197-198; penalties, 199-200; runaways, 200-204; outlawry, 204; hunting, 204-207; travel, 207-208; property, 208-210; life, 210-212; and the Established Church, 213-218; and the Quakers, 219-223; and the Baptists, 223-224; social life, 224-228; marriage, 225-226; conspiracy, 229-232; free negroes, 233-239; Indian slavery, 239-242; white servitude, 243-254; bibliography, 173. *See* Contents, 177.
- Slaves, special court for, 196-197, 447-448; conversion of, 213-224, 423.
- Slave trade, 190-192, 420, 424-432, 440.
- South, economic condition of, 181-183.
- Sparks, F. E., on the "Causes of the Maryland Revolution of 1689," 473-579.
- Specie, in Maryland, 522, 562; exportation of, 522.
- State appointment, 49, 56-57, 68, 70, 76-77.
- Staunton Convention, of 1816, 279; of 1825, 281-282 and note; of 1846, 308.
- Streets, care for, 80-81.
- Suffrage, extension of, 274 note, 279 note, 282 and note, 297 note, 309 note, 314 note, 322 note, 324 note; basis, 302, 313-315, 318-328; restriction of, 505, 520, 534, 538-539, 546-547.
- Suffrage, in Hawaii, 19-21, 26-28, 37.
- T
- Taxation, in Baltimore, 49, 52, 54, 60, 63, 70-73, 81, 84.
- Taxation, in Connecticut, 343-409; influence of Massachusetts, 347-349, 348 note, 358-359, 361, 367 and note, 382 note, 403; germs of taxation, 349-352; land tax, 353-357; exemptions, 354 note, 360 note, 362 note, 363 note, 380-381, 380 note; property tax, 358-360; poll tax, 361-363, 361 note; income tax, 363-365; apportionment, 366 and note, 377; Grand List, 367-374; officers, 368-374, 384-389; forfeiture, 370 note, 371 note, 374; appeal, 372; "will and doom," 373-374; fourfolding, 374 and note; power to levy, 375-377; reduplication, 377-380; bills of credit, 381-383; collection, 384-389; abatement, 389; discount, 389-390; indirect taxes, 391-397; local taxes, 398-408; poor rates, 405; appendix, 409. *See* Contents, 343.
- Taxation, in Maryland, 491-493.
- Taxation, in New Haven, 348 note, 349-355, 358-359, 363, 368, 370, 377, 385 note, 387 note, 391 note, 394, 395 note.
- Taxation basis, 291 note, 303 note, 306, 320 note, 322.
- Testimony, of slaves, 197-199, 449, 462; of free negroes, 236, 462.
- Thomas, Dr. T. P., on "The City Government of Baltimore," 43-91.
- Tobacco, as money, 493, 518, 521, 542, 568-569; cessation of, 513-514, 559.
- Toleration, in Connecticut, 398-402 and note; in Maryland, 494, 500-501, 534, 542, 545.
- Tonnage duties, in Baltimore, 54; in Connecticut, 397; in Maryland, 509, 554, 573, 576.
- Towns, establishment of, 481, 497, 551, 559-562, 565 note, 567 note.
- Towns, representation of, 271-272 and note, 337.
- U
- Unicameral legislature, 484, 485, 494, 504-505.

## V

- Valuation, of property, 354-357, 354 notes, 359-360, 364-365, 373, 379.
- Veto, of governor, in Massachusetts, 113 note; in Connecticut, 129, 131; in New Hampshire, 138 and note, 140; in Rhode Island, 156, 158 note, 160; in Maryland, 482, 484.
- Veto, of king, 15, 17, 25, 32.
- Veto, of Proprietor, 481, 483, 486, 516, 527, 540, 554, 564, 568-569, 573, 575.
- Virginia, influence on Maryland, 478, 480, 504, 520, 534, 543-544, 551, 572.
- Virginia, representation in, 259-337; early government, 263-267; borough representation, 268-269; representation by county, 269, 271; by parish, 269-270; by town, 271; under constitution of 1776, 272-273; inequalities, 1776-1829, 274-285; reapportionment of Senate, 280; Richmond Convention, 285-298; agitation, 299-313; Reform Convention, 310-325; separation of West Vir-

ginia, 326; reconstruction, 327-328; Underwood Convention, 328-333; reapportionment of 1871, 334; of 1878, 335; of 1891, 336; the basis, 336-337; synopsis, 259-260; sources, 260, 315 note. *See* Contents, 261.

## W

- Wardens of the Port, 54, 62-63, 67 note.
- Water supply, 61, 67, 71-72, 82.
- Watertown incident, 375 note.
- West Virginia, separation of, 326-327.
- White basis, 278-297, 301-306, 318, 323, 326.
- White labor, in North Carolina, 192-193, 253.
- White servitude, in North Carolina, 243-254; obstacles, 243-245; inducements, 246; runaways, 247-248; treatment, 248-250; sexual relations, 250-252; freedom dues, 252-253; vagrants, 253-254.
- "Will and doom," 373-375.
- Woolman, John, 431.

















